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N. 2938

No. 14762

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**United States**  
**Court of Appeals**  
for the Ninth Circuit.

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IN THE MATTER OF THE APPLICATION OF  
BEN WASSERMAN FOR ADMISSION TO  
THE BAR OF THE UNITED STATES  
DISTRICT COURT, SOUTHERN DIS-  
TRICT OF CALIFORNIA, BEN WASSER-  
MAN,

Appellant.

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**Transcript of Record**

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**Appeal from the United States District Court**  
**Southern District of California**  
**Central Division**

**FILED**

**AUG - 8 1955**



No. 14762

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United States  
Court of Appeals  
for the Ninth Circuit.

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IN THE MATTER OF THE APPLICATION OF  
BEN WASSERMAN FOR ADMISSION TO  
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Transcript of Record

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Appeal from the United States District Court  
Southern District of California  
Central Division





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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**NAME AND ADDRESS OF ATTORNEY**

**For Appellant:**

**BERTRAM S. HARRIS,  
8221 West 3rd St.,  
Los Angeles 48, Calif.**



In the United States District Court, Southern  
District of California, Central Division

No. 18095-Y

In Re: Application of:

BEN WASSERMAN, for Admission to the BAR  
OF THIS COURT.

MOTION OF BERTRAM S. HARRIS TO  
ADMIT BEN WASSERMAN AS A MEM-  
BER OF THE BAR OF THE ABOVE-EN-  
TITLED COURT

Comes Now, Bertram S. Harris, a member of  
the Bar of the above-entitled Court, in good stand-  
ing, and moves the Court that Ben Wasserman be  
admitted as an attorney at law and as a member  
of the said bar of the said Court, with all of the  
privileges appertaining thereto, and in support  
thereof alleges:

I.

That the applicant, Ben Wasserman, is a mem-  
ber of the following Bars in good standing: The  
State of Arkansas, The United States District  
Court for the Eastern District of Arkansas and  
the United States Court of Appeals for the Ninth  
Circuit.

II.

That the applicant, Ben Wasserman, is possessed  
of good moral character; that no proceedings have  
ever been instituted against him for disbarment or

suspension, as a member of the Bar, before any Court wherein he is enrolled.

### III.

That the United States District Court for the Southern [2\*] District of California, is a separate and independent Court, maintaining its own roll of attorneys; it is not subject to the appellate or supervisory jurisdiction of any Court of the State of California, the State Bar of California, or any administrative agency of the State of California.

### IV.

That the United States District Court for the Southern District of California, is an inferior Court created by Congress, directly under and subject to the appellate and supervisory jurisdiction of the United States Court of Appeals for the Ninth Circuit; and therefore, all members of the Bar admitted to practice law before the United States Court of Appeals for the Ninth Circuit are automatically members of the Bar of the United States District Court for the Southern District of California and may appear and represent clients as an attorney, advocate, proctor, solicitor, and counselor of said Court, with all of the rights and privileges appertaining thereto.

### V.

That a person admitted to practice as an attorney before any District Court of the United States, and is a member of the said Court in good stand-

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**\*Page numbering appearing at foot of page of original Certified Transcript of Record.**

ing, is automatically qualified to practice his profession before the United States District Court for the Southern District of California, and upon motion duly made, the applicant shall be admitted, sign the roll of attorneys and receive a certificate of admission to practice.

## VI.

That the several United States District Courts throughout the United States of America, have concurrent jurisdiction to admit attorneys to practice before them, and admission to practice in one jurisdiction is admission to practice in all jurisdictions; that the several Courts have only jurisdiction to supervise said attorneys appearing before them or practicing in said Courts, and [3] to require said attorneys to sign the roll of attorneys.

## VII.

Rule 1(b), of the United States District Court for the Southern District of California, requires as a condition for admission to its Bar, that the applicant be an active member in good standing, of the State Bar of California; the said Rule 1(b), therefore, is class legislation, arbitrary and capricious; that if the applicant herein is refused admission to the Bar of this Court on the sole ground that he is not a member in good standing, of the State Bar of California, then the substantial rights of this applicant are affected, in contravention of Article I, Sections 8.9 and 10; Article III, Sections 1 and 2.2; Article IV, Sections 1 and 2.1;

Article VI, Section 2; Amendment V; and Amendment XIV, of the Constitution of the United States of America.

Wherefore, it is prayed that Ben Wasserman, applicant herein, be admitted to the Bar of the United States District Court as an attorney, counselor, solicitor, advocate and proctor, with all of the rights and privileges appertaining thereto.

/s/ BERTRAM S. HARRIS.

[Endorsed]: Filed April 21, 1955.

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[Title of District Court and Cause.]

AFFIDAVIT OF BEN WASSERMAN IN SUPPORT OF HIS APPLICATION AND MOTION FOR HIS ADMISSION TO THE BAR OF THE ABOVE-ENTITLED COURT

State of California,  
County of Los Angeles—ss.

Ben Wasserman, being first duly sworn, deposes and states: that he is a person possessed of good moral character; that on January 16, 1933, he was duly admitted to practice as an attorney at law in the Supreme Court and all inferior Courts in the State of Arkansas, that no proceedings for suspension or disbarment have ever been instituted against him, and that he is now a member of said Bar in good standing; that on September 13, 1933, he was duly admitted to practice as an attorney in the



United States District Court for the Eastern District of Arkansas, that no proceedings for suspension or disbarment have ever been instituted against him, and that he is now a member of the said Bar in good standing; that on August 4, 1954, he was duly admitted to practice as an attorney and counselor in the United States Court of Appeals for the Ninth Circuit, that no proceedings have ever been instituted against him [5] for suspension or disbarment, and that he is now a member of the said Bar in good standing; that he is a citizen of the United States and a resident of Los Angeles County, California; that he is not now nor was he ever a member of the State Bar of California, or any other Bar except those herein mentioned; that as a citizen of the United States and as a member of the Bar, in good standing, of the jurisdictions herein mentioned, he claims equal rights and privileges as those accorded members of the State Bar of California, that he be afforded the right to practice his profession as an attorney, counselor, solicitor, advocate and proctor before the United States District Court for the Southern District of California, with all of the rights and privileges appertaining thereto.

Wherefore, affiant prays that he be admitted to the Bar of the United States District Court for the Southern District of California, that he be permitted to sign the roll of attorneys and that he have a certificate of his admission issued to him upon payment of the fees required in such cases.

/s/ BEN WASSERMAN.

Subscribed and sworn to before me, this 14th day of April, 1955.

[Seal]      /s/ BERTRAM S. HARRIS,  
Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: Filed April 21, 1955. [6]

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[Title of District Court and Cause.]

### ORDER

On motion duly made, this 18th day of April, 1955, by Bertram S. Harris, a member of the Bar of this Court, in good standing, to admit as an attorney and member of the Bar of this Court, Ben Wasserman, a member in good standing, of the Bars of, the State of Arkansas, United States District Court for the Eastern District of Arkansas, and the United States Court of Appeals for the Ninth Circuit; and

The Court Having Jurisdiction of the subject matter herein and of the parties hereto:

It Is Hereby Ordered, that Ben Wasserman be admitted as an attorney and member of the Bar of the United States District Court for the Southern District of California, with all of the rights and privileges appertaining thereto; that he be permitted to sign the roll of attorneys and upon pay-

ment of the regular fees he have issued to him a certificate of such admission.

Dated at Los Angeles, Calif., April 18, 1955.

.....,  
Judge, United States District Court, Southern District of California.

Lodged April 18, 1955. [7]

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In the United States District Court, Southern District of California, Central Division

No. 18095-Y

In Re: Application of:

BEN WASSERMAN, for Admission to the Bar of the ABOVE-ENTITLED COURT.

### ORDER

On motion duly made, April 18, 1955, by Bertram S. Harris, a member of the Bar of this Court in good standing, to admit as an attorney and member of the Bar of this Court, Ben Wasserman, a member in good standing of the Bars of, the State of Arkansas, United States District Court for the Eastern District of Arkansas, and the United States Court of Appeals for the Ninth Circuit; and

The Court being fully advised in the premises and having jurisdiction of the subject matter herein and of the parties hereto,

## Finds

(1) That the applicant for admission, Ben Wasserman, is not a member of the State Bar of California and therefore is not eligible for admission to the Bar of this Court; under the rules of this Court; and

(2) That the said applicant is not otherwise entitled under the Constitution or laws of the United States to become a member of the Bar of this Court;

Therefore, It Is Hereby Ordered, Adjudged, and Decreed, [8] that Ben Wasserman be denied admission to the Bar of this Court; and the motion of Bertram S. Harris, a member of the Bar of this Court in good standing, to admit Ben Wasserman, as a member of the Bar of this Court is also denied.

Dated: April 20, 1955.

/s/ LEON R. YANKWICH,  
Judge, United States District Court, Southern District of California.

[Endorsed]: Filed April 21, 1955.

Judgment docketed and entered April 21, 1955. [9]

---

[Title of District Court and Cause.]

## NOTICE OF APPEAL

Notice Is Hereby Given, that Ben Wasserman, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the Order made

in the above-entitled matter on April 20, 1955, wherein said Ben Wasserman was denied admission to the Bar of the above-entitled Court, and from the whole of said Order.

Dated: Los Angeles, California, April 22, 1955.

/s/ BERTRAM S. HARRIS,  
Attorney for Appellant  
Ben Wasserman.

[Endorsed]: Filed April 22, 1955. [10]

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In the United States District Court, Southern  
District of California, Central Division

In the Matter of the Application of  
BEN WASSERMAN, for Admission to the BAR  
of this COURT.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Honorable Leon R. Yankwich, Judge Presiding.

Appearances:

For the Applicant:

BERTRAM S. HARRIS, ESQ.

Monday, April 18, 1955, 10:00 A.M.

The Court: Are there any ex parte matters? Admissions to the Bar?

Mr. Harris: Yes, your Honor.

The Clerk: This is Mr. Bertram S. Harris, speaking.

Mr. Harris: At this time, your Honor, I move the admission of Ben Wasserman, a member of the following Bars in good standing: The State of Arkansas, the United District Court for the Eastern District of Arkansas, and the United States Court of Appeals for the Ninth Circuit.

No proceedings have ever been brought against this man for suspension or disbarment, and he is a member in good standing in those courts.

He is not, however, a member of the California State Bar, and I am making this motion on the ground that I believe that Rule 1(b) of the United States District Court for the Southern District of California, which requires as a condition for admission to its Bar, that the applicant be an active member in good standing of the State Bar is unconstitutional; that it represents class legislation, and it is arbitrary and capricious; that if this applicant is refused admission to this Bar on the sole ground that he is not a member in good standing of the State Bar of California, then his substantial rights are affected, in contravention of Article I, Sections 8.9 and [2\*] 10; Article III, Sections 1 and 2.2; Article IV, Sections 1 and 2.1; Article VI, Section

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**\*Page numbering appearing at top of page of original Reporter's Transcript of Record.**

2; and the Fifth Amendment and the Fourteenth Amendment of the Constitution of the United States of America.

I present Mr. Ben Wasserman.

The Court: You may be seated—both of you.

From time immemorial it has been the recognized principle for the District Courts of the United States to have the right to determine the conditions upon which a person should be admitted to practice. At the Judicial Conference of the judges of the Ninth Circuit two or three years ago there was presented for approval a then pending Act of Congress, which would automatically admit to any District Court of the United States any person who has been admitted to practice in the Supreme Court of the United States. The Conference, consisting of the judges of the Ninth Circuit and such lay delegates as were appointed, declined approval. Among those who participated, of course, were the judges of the Court of Appeals for the Ninth Circuit.

At the prior Conference a discussion was had on the basis of a suggestion that admission be regulated by a rule of civil procedure to be proposed as an amendment to the Federal Rules, which would make admission into one Circuit a ground for admission into another. The judges voted against it.

I may say that this motion has just come in. I had no [3] notice, and I am relying on my memory, which I think is pretty accurate, in pointing out some of the historical facts which lie behind the rule.

There are districts, even in the Ninth Circuit,

which admit anyone to practice who is admitted in any of the States in the Circuit. That is the rule in the State of Washington, and because of the proximity of the two States, Washington and Oregon, where I have sat in one or the other of those States, either at Portland, Seattle or Tacoma, lawyers from Portland and Seattle have appeared in the courts, the only requirement being to be admitted to practice in one or the other of the Districts.

We have made membership in the State Bar here a condition. I may say that at the last Conference I was one of the leaders opposing the rule that once a man is admitted before another District Court, or even before the Supreme Court of the United States, that he be admitted in California. I pointed to the fact that that would create a dual bar membership. We would have members, who are members of the organized State Bar, subject to investigation before they are admitted as to their character, subject in instances to examinations which they must pass to satisfy the Board that they possess the learning and such knowledge of our particular laws which are necessary to any practitioner. That may not seem applicable on first impression to the Federal courts, but when you bear in mind [4] that a large percentage of our work comes from diversity, in which, as the Supreme Court has said, we merely sit as another State court, it becomes very important that the man who practices in the District Court not only be amenable to the discipline of the State Bar, but



that he be conversant with the laws of California, with which he will have to deal as a practitioner. Admission to our Bar does not limit him merely to appearances in patent cases, or copyright cases, or tax cases, which are of a Federal character. He may appear in a diversity case, or in a personal injury case in which one of the defendants is a non-resident. He may appear in a case, for instance, against Sears-Roebuck, which is a foreign corporation, or against the May Company, or many other of our mercantile institutions which are foreign corporations, and which, therefore, are sued in the Federal courts.

So the reason for tying our admissions to the State Bar is as I have stated, so that all the persons who appear before us are in the same category. Otherwise we would have a group which is automatically a part of the State Bar, and a group over which the State Bar would have no control and that would be subject only to such control as we might exercise under our Federal rules. It has never been held that the mere fact a man is admitted to the practice of law in one State permits him to practice law in another State. California, however, is what is known as a comity State, and in the past many were [5] admitted without taking a Bar examination. I myself was in that category. In 1909 I was admitted to the Bar of Oregon, taking the Bar examination there, and shortly thereafter I came to California and was admitted at that time upon a certificate showing that I was a member in good standing of the Oregon Bar.

At the present time there are certain limitations. A person must have practiced a certain number of years—five years, I think it is—and then may be admitted upon being subjected to a limited examination, and that is an examination relating to particular Federal procedural matters.

There is one exception that we make, and that is merely because the law so provides. A person who is an attorney for a governmental agency has the right to appear in our court, even though he not be a member of the local State Bar. For instance, we have had men in the Lands Division and men in the Anti-trust Division who have appeared before our courts, but that is merely because the law so recognizes. Furthermore, they recognize government attorneys to such an extent that even in the rules relating to criminal procedure provision is made that a government attorney may appear before the grand jury, and a government attorney need not necessarily be a member of the Bar of the State.

Those are some of the matters which should be adverted to in ruling on a matter of this [6] character.

The motion to admit Mr. Ben Wasserman as a member of the Bar of this court will be denied.

The Clerk: In order to make an appeal record, should counsel prepare an order?

The Court: Yes, counsel should prepare an order. I think I will have this petition filed under Miscellaneous.

The Clerk: We can lodge that order.

The Court: You can lodge the order, but an order should be made conforming to the rules, showing that the motion is denied upon the ground that the applicant is not a member in good standing of the State Bar and, therefore, is not eligible, and that the Court finds that he is not otherwise entitled under the Constitutional laws of the United States to become a member of this Bar.

Mr. Harris: I will prepare it, your Honor.

The Court: All right. [7]

### Certificate

I, Marie G. Zellner, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 19th day of April, A.D. 1955.

/s/ MARIE G. ZELLNER,  
Official Court Reporter.

[Endorsed]: Filed April 21, 1955.

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 11 inclusive, contain the original

Motion of Bertram S. Harris to Admit Ben Wasserman as a Member of the Bar of the Above-Entitled Court, with Affidavit of Ben Wasserman;

Proposed Form of Order, Lodged April 18, 1955;

Order Denying Motion;

Notice of Appeal;

Appellant's Designation of Record on Appeal;

which together with one volume of Reporter's Transcript of proceedings had on April 18, 1955; in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit in said cause.

I further certify that my fees for preparing the foregoing record amount to \$1.60, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 12th day of May, 1955.

[Seal]

EDMUND L. SMITH,  
Clerk.

By /s/ THEODORE HOCKE,  
Chief Deputy.

[Endorsed]: No. 14762. United States Court of Appeals for the Ninth Circuit. In the Matter of the Application of Ben Wasserman for Admission to the Bar of the United States District Court, Southern District of California, Ben Wasserman, Appellant. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed May 14, 1955.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit

No. 14762

In the Matter of

The Application of BEN WASSERMAN, for Admission to the Bar of the United States District Court, for the Southern District of California,

Appellant,

vs.

UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF CALIFORNIA,

Appellee.

CONCISE STATEMENT OF POINTS ON  
WHICH APPELLANT INTENDS TO RELY

Following, is a concise statement of points on which the appellant intends to rely:

## I.

That the United States District Court for the Southern District of California, is a separate and independent court maintaining its own roll of attorneys; it is not subject to appellate or supervisory jurisdiction of any court of the State of California, the State Bar of California, or any administrative agency of the State of California; and therefore cannot limit admission to its bar to members of the Bar of the State of California; and cannot enter into any agreement with any branch of gov-

ernment or administration agency to limit admission to the Bar of the United States District Court to only members of the Bar of the State of California.

## II.

That the United States District Court for the Southern District of California, is an inferior court created by Congress, directly under, and subject to the appellate and supervisory jurisdiction of the United States Court of Appeals for the Ninth Circuit; and therefore, all members of the bar admitted to practice law before the United States Court of Appeals for the Ninth Circuit, are automatically members of the Bar of the United States District Court for the Southern District of California, and may appear, participate in any and all proceedings and otherwise represent clients as an attorney, advocate, proctor, solicitor and counselor of said court, with all of the rights and privileges appertaining thereto.

## III.

Any person admitted to practice as an attorney before any District Court of the United States, and who is a member of the bar of said court in good standing, is automatically qualified to practice his profession, whenever he chooses, before the United States District Court for the Southern District of California; and upon motion duly made, the applicant shall be admitted, sign the roll of attorneys, and receive a certificate of his admission to practice.

## IV.

That the several United States District Courts throughout the United States of America, have concurrent jurisdiction to admit attorneys to practice in its courts, and admission to practice in one jurisdiction is admission to practice in all jurisdictions; that the several courts have only jurisdiction to supervise said attorneys appearing before them or practicing in said court, and to further require that said attorney sign the roll of attorneys of the local court wherein he is appearing.

## V.

Rule 1(b), of the United States District Court for the Southern District of California, limits admission to its bar, exclusively, only active members of the Bar of the State of California and excludes all others, regardless of whether such attorney is of good moral character and otherwise possesses the qualification of being a member of the bar in good standing, regardless of the jurisdiction wherein he is enrolled. Appellant therefore charges, that he has been put in a class different than members of the Bar of the State of California, and further charges:

(A) That the rules of court of the United States District Court for the Southern District of California amounts to class legislation, preempting its role of attorneys to members of the Bar of the State of California;

(B) That the said rule of court is arbitrary and capricious;



(C) That the said rule of court affects the substantial rights of appellant herein, in that it is in contravention of Article I, Sections 8.9 and 10, of the Constitution of the United States of America;

(D) That the said rule of court, affects the substantial rights of appellant herein, in that it is in contravention of Article III, Sections 1 and 2.2, of the Constitution of the United States of America;

(E) That the said rule of court affects the substantial rights of appellant herein, in that it is in contravention of Article IV, Sections 1 and 2.1, of the Constitution of the United States of America;

(F) That the said rule of court affects the substantial rights of appellant herein, in that it is in contravention of Article VI, Section 2, of the Constitution of the United States of America;

(G) That the said rule of court affects the substantial rights of appellant herein, in that it is in contravention of Amendment V, to the Constitution of the United States of America;

(H) That the said rule of court affects the substantial rights of appellant herein, in that it is in contravention of Amendment XIV, of the Constitution of the United States of America.

## VI.

The United States District Court for the Southern District of California favors the United States of America in that it makes it a special litigant permitting its attorneys, regardless of the jurisdic-

tion in which they have been admitted to practice, although they are not members of the California bar, to appear before it and practice law before it, without limit and without restriction, the same privileges being denied to private litigants.

Dated: May 19, 1955.

/s/ BERTRAM S. HARRIS,  
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 25, 1955.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

IN THE MATTER OF THE APPLICATION OF BEN WASSER-  
MAN FOR ADMISSION TO THE BAR OF THE UNITED  
STATES DISTRICT COURT, SOUTHERN DISTRICT OF  
CALIFORNIA, BEN WASSERMAN,

*Appellant.*

---

BRIEF FOR APPELLANT.

---

BERTRAM S. HARRIS,  
8221 West Third Street,  
Los Angeles 48, California,  
*Attorney for Appellant.*

**FILED**

**SEP 14 1955**

**PAUL P. O'BRIEN, CLERK**



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No. 14762

IN THE

# United States Court of Appeals

## FOR THE NINTH CIRCUIT

---

IN THE MATTER OF THE APPLICATION OF BEN WASSERMAN FOR ADMISSION TO THE BAR OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, BEN WASSERMAN,

*Appellant.*

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### BRIEF FOR APPELLANT.

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This is an appeal from a final order, and the whole of said order, whereby the Honorable Leon R. Yankwich, Judge of the United States District Court, Southern District of California, denied admission to the Bar of said Court to Ben Wasserman, appellant herein, a member in good standing of the Bar of this Court, the Bar of the State of Arkansas and the Bar of the United States District Court for the Eastern District of Arkansas, on the following grounds:

(1) That the applicant for admission, Ben Wasserman, is not a member of the State Bar of California, and therefore is not eligible for admission to the Bar of the United States District Court, Southern District of California, under the Rules of said Court; and

(2) That the said applicant is not otherwise entitled under the constitution or laws of the United States to become a member of the Bar of the said Court [R. 9, 10].

## Jurisdictional Statement.

Jurisdiction of this cause in the United States District Court, Southern District of California, is alleged to be conferred by virtue of Rule 1, of the Rules of the said Court. Jurisdiction of this Court is alleged to be conferred by virtue of 28 U. S. C. 1292, and on authority of *Application of Fink*, 208 F. 2d 898, and *In re Summers*, 325 U. S. 561, 65 S. Ct. 1307, 89 L. Ed. 1795.

## Statement of the Case.

Ben Wasserman, appellant herein, is a member of the Bar in good standing of the Bar of Arkansas, the Bar of the United States District Court, Eastern District of Arkansas and the Bar of the United States Court of Appeals for the Ninth Circuit. Bertram S. Harris, a member of the Bar, in good standing, of the United States District Court, Southern District of California, moved the admission of Ben Wasserman, appellant herein, to the Bar of the said Court [R. 3, 4, 5, 6]. In connection therewith, appellant herein filed his affidavit in support of said motion [R. 6, 7]. No opposition was filed to said motion and affidavit, and no parties intervened in the proceedings. The Court denied said motion and application for admission [R. 10]. On April 22, 1955, Notice of Appeal was duly filed [R. 11].

## Questions Presented by This Appeal.

(1) Can the United States District Court for the Southern District of California arbitrarily limit admission to its Bar exclusively to members of the Bar of the State of California although members of the Bar in other jurisdictions are equally qualified to practice the profession?



(2) Can the United States District Court for the Southern District of California enter into a private agreement with the State Bar of California, that: only members of the State Bar of California shall be admitted to the Bar of the United States District Court for the Southern District of California?

(3) Are all members of the Bar of the United States Court of Appeals for the Ninth Circuit automatically members of the Bar of each and every United States District Court within its jurisdiction and over whom it exercises appellate jurisdiction?

(4) All District Courts of the United States are a creation of the United States Constitution and Act of Congress having concurrent jurisdiction except for venue and is actually one Court subject to supervisory and appellate jurisdiction of the Supreme Court of the United States. The question presented is:

Is admission to the Bar of the United States District Court in one jurisdiction admission to the Bar in all jurisdictions?

(5) Once admitted to practice before the Bar of any United States District Court, and still in good standing, does such attorney need to be admitted specially to practice before the United States District Court in another jurisdiction?

(6) Once admitted to practice before the Bar of any United States District Court, and still in good standing, can such attorney be refused the right to institute proceedings in behalf of his clients or defend a civil or criminal action in behalf of his client whether he is a resident or non-resident within the jurisdiction of a United States District Court having jurisdiction of the issues, and not

having been previously admitted to the Bar of said Court where the venue is laid?

(7) The Rules of Court for the United States District Court, Southern District of California, provide: (a) that an attorney in good standing before any United States District Court, if he is a resident of the Southern District of California, cannot under any condition, appear as an attorney in said court unless he has first been admitted to its Bar; and (b) that the said Court will admit to its Bar only those persons who are first admitted to the Bar of the State of California. The questions presented are:

(a) By refusing appellant herein the right to appear as attorney under any conditions has he been placed in a class different than other attorneys?

(b) By refusing appellant herein admission to the Bar of its Court has said appellant been placed in a class different than other attorneys?

(8) The Rules of Court of the United States District Court for the Southern District of California permit all United States Attorneys and their deputies to appear in its Court without prior admission, in behalf of the United States, even though such attorneys are admitted only to the jurisdictions that appellant has been admitted. The questions presented are:

(a) Can the said Court select the litigant for whom an attorney, not admitted to its Bar, may appear in its behalf?

(b) Can attorneys, not admitted to its Bar, appear for certain clients and be preemptorily denied such right to appear for other clients?

(c) Does this place appellant herein in a class different than other attorneys?

(d) Can the said Court deny to attorneys for others, those privileges extended to attorneys for the United States Government?

(9) In preempting admission to the Bar of its Court to members of the Bar of the State of California, does this amount to class legislation placing appellant herein in a class different than other attorneys?

(10) Does the said Rule of Court affect the substantial rights of appellant herein, in that the same is arbitrary and capricious?

(11) Does the said Rule of Court affect the substantial rights of appellant herein, in that it is in contravention of Article I, Sections 8.9 and 10, Article III, Sections 1 and 2.2, Article IV, Sections 1 and 2.1, Article VI, Section 2, and Amendments V and XIV, of the Constitution of the United States of America?

## Specification of Errors.

### I.

That the United States District Court for the Southern District of California, is a separate and independent court maintaining its own roll of attorneys; it is not subject to appellate or supervisory jurisdiction of any court of the State of California, the State Bar of California, or any administrative agency of the State of California; and therefore cannot limit admission to its bar to members of the Bar of the State of California; and cannot enter into any agreement with any branch of government or administration agency to limit admission to the Bar of the United States District Court to only members of the Bar of the State of California.

### II.

That the United States District Court for the Southern District of California, is an inferior court created by Congress, directly under, and subject to the appellate and supervisory jurisdiction of the United States Court of Appeals for the Ninth Circuit; and therefore, all members of the bar admitted to practice law before the United States Court of Appeals for the Ninth Circuit, are automatically members of the Bar of the United States District Court for the Southern District of California, and may appear, participate in any and all proceedings and otherwise represent clients as an attorney, advocate, proctor, solicitor and counselor of said court, with all of the rights and privileges appertaining thereto.

### III.

Any person admitted to practice as an attorney before any District Court of the United States, and who is a member of the bar of said court in good standing, is automatically qualified to practice his profession, whenever

he chooses, before the United States District Court for the Southern District of California; and upon motion duly made, the applicant shall be admitted, sign the roll of attorneys, and receive a certificate of his admission to practice.

#### IV.

That the several United States District Courts throughout the United States of America, have concurrent jurisdiction to admit attorneys to practice in its courts, and admission to practice in one jurisdiction is admission to practice in all jurisdictions; that the several courts have only jurisdiction to supervise said attorneys appearing before them or practicing in said court, and to further require that said attorney sign the roll of attorneys of the local court wherein he is appearing.

#### V.

Rule 1(b), of the United States District Court for the Southern District of California, limits admission to its bar, exclusively, only active members of the Bar of the State of California and excludes all others, regardless of whether such attorney is of good moral character and otherwise possesses the qualification of being a member of the bar in good standing, regardless of the jurisdiction wherein he is enrolled. Appellant therefore charges, that he has been put in a class different than members of the Bar of the State of California, and further charges:

(A) That the rules of court of the United States District Court for the Southern District of California amounts to class legislation, preempting its role of attorneys to members of the Bar of the State of California;

(B) That the said rule of court is arbitrary and capricious;

(C) That the said rule of court affects the substantial rights of appellant herein, in that it is in contravention of Article I, Sections 8.9 and 10, of the Constitution of the United States of America;

(D) That the said rule of court, affects the substantial rights of appellant herein, in that it is in contravention of Article III, Sections 1 and 2.2, of the Constitution of the United States of America;

(E) That the said rule of court affects the substantial rights of appellant herein, in that it is in contravention of Article IV, Sections 1 and 2.1, of the Constitution of the United States of America;

(F) That the said rule of court affects the substantial rights of appellant herein, in that it is in contravention of Article VI, Section 2, of the Constitution of the United States of America;

(G) That the said rule of court affects the substantial rights of appellant herein, in that it is in contravention of Amendment V, to the Constitution of the United States of America;

(H) That the said rule of court affects the substantial rights of appellant herein, in that it is in contravention of Amendment XIV, of the Constitution of the United States of America.

## VI.

The United States District Court for the Southern District of California favors the United States of America in that it makes it a special litigant permitting its attorneys, regardless of the jurisdiction in which they have been admitted to practice, although they are not members of the California bar, to appear before it and practice law before it, without limit and without restriction, the same privileges being denied to private litigants.

## Summary of the Argument.

1. The United States District Court for the Southern District of California cannot limit admission to its Bar exclusively to members of the Bar of the State of California.

(A) The said Court cannot preempt residents of the Southern District of California, who are not members of the Bar of the State of California, but are members of the Bar of the United States District Court of another jurisdiction, or of a United States Court of Appeals, or of the Supreme Court of the United States, from appearing in behalf of any client in said Court.

(B) All members of the Bar admitted to the United States District Court of another jurisdiction are permitted to practice before the United States District Court for the Southern District of California and need not be specially admitted.

(C) All members of the Bar admitted to the United States District Court for another jurisdiction and in good standing shall be admitted to the Bar of the United States District Court for the Southern District of California upon motion duly made shall be so admitted, sign the roll of attorneys and receive his certificate of admission upon payment of all fees.

(D) All members of the Bar of the Supreme Court of the United States and the United States Court of Appeals for the Ninth Circuit are automatically members of the Bar of the United States District Court for the Southern District of California, need not be specially admitted to said Court and may practice their profession in said Court without any further requirements.

(E) The United States District Court is a separate and independent Court, maintaining its own roll of attorneys, is not subject to appellate or supervisory jurisdiction of any state court or administrative agency and cannot enter into any agreement with any state or administrative agency of said state limiting admission to its Bar exclusively to members of the Bar of said state.

(F) The Rule of Court limiting admission to its Bar exclusively to members of the Bar of one state is arbitrary and capricious, is class legislation and affects the substantial rights of all other lawyers, in contravention of Article I, Sections 8.9 and 10, Article III, Sections 1 and 2.2, Article IV, Sections 1 and 2.1, Article VI, Section 2, and Amendments V and XIV, of the Constitution of the United States of America.

(G) The United States District Court for the Southern District of California, favors the United States of America, in that it makes it a special litigant, by permitting its attorneys, regardless of the jurisdiction in which they have been admitted to practice, although they are not members of the Bar of the State of California, to appear before it and practice law before it, without limit or restriction, the same privileges being denied to private litigants. Private litigants should be in exactly the same position as the United States Government: to retain counsel of their own choosing who shall appear for them, the same as attorneys selected by the United States Government, without limit, reservation or restriction.



## ARGUMENT.

### I.

**The United States District Court for the Southern District of California Cannot Limit Admission to Its Bar Exclusively to Members of the Bar of the State of California.**

This argument is consolidated into one so as to include sub-titles and sub-arguments (A), (B), (C), (D), (E), (F), and (G), from the Summary of the Argument, and is to be considered as though fully set forth herein. This is so done in order to avoid repetition, with consideration of convenience to the Court.

This Court will take judicial notice that all of the Federal Courts are separate, independent and apart from the State Courts, each having jurisdiction to set rules for admission to its individual Bars. The Supreme Court of the State of California in *Ex parte McCue*, 211 Cal. 57, 293 Pac. 47, held: That State Statutes regulating the practice of law are inapplicable to Federal Courts. However, in regulating admission to its individual Bar, no Court may set up rules for admission which are discriminatory, arbitrary and capricious. In the case of *Cummings v. Missouri*, 4 Wall. 321, the Court held:

“The theory upon which our political institutions rest is that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law.”

And in the case of *Bradwell v. Illinois*, 16 Wall. (U. S.) 130, it was held: *That whatever are the privileges and immunities of a citizen in one state he carries them with*

him into every state which he emigrates. In that case it was therein stated:

“The 14th Amendment executes itself in every state of the Union. Whatever are the privileges and immunities of a citizen in the State of New York, such citizen emigrating carries them with him into any other state of the Union. It utters the will of the United States in every state, and silences every State Constitution, usage or law which conflicts with it. *If to be admitted to the bar, on attaining the age and learning required by law, be one of privilege of a white citizen in the State of New York, it is equally the privilege of a colored citizen in that State; and if in that state, then in any state. If no state may make or enforce any law to abridge the privileges of a citizen, it must follow that the privileges of all citizens are the same.*” (Italics supplied.)

It is therefore axiomatic, that if a member of the Bar of the State of California may be admitted to practice before the Bar of the United States District Court for the Southern District of California, then a member of the Bar of any State of the United States should be accorded the same consideration, privileges and immunities. *Thus, if being admitted to the Bar of the United States District Court for the Southern District of California be one of privilege of a member of the Bar of the State of California, it is equally the privilege of a member of the Bar of the State of Arkansas or any other State in the Union.* In *Brooks v. Laws*, 208 F. 2d 18, the Court reaffirmed and echoed the postulate of Chief Justice Taney, who long ago held in *Ex parte Secombe*, 19 How. 9, 60 U. S. 9, 15 L. Ed. 565, as follows:

“It rests exclusively with the Court to determine who is qualified to become one of its officers, as an

attorney and counselor, and for what cause he ought to be removed. *This rule, he said, was subject to the limitation that the power be not arbitrarily exercised by the lower court.*" (Italics supplied.)

And so, in the recent case of *In re Summers*, 325 U. S. 561, 89 L. Ed. 1795, 65 S. Ct. 1307, the Supreme Court of the United States granted certiorari to review the action of the Supreme Court of the State of Illinois when it denied admission to the Bar to Clyde Wilson Summers, the applicant, and stated as follows:

"Only a decision which violated a federal right secured by the Fourteenth Amendment would authorize our intervention."

Thus, the Court held: *That the responsibility for choice as to personnel of the Illinois Bar rests with Illinois so long as the method of selection does not violate a federal right secured by the Fourteenth Amendment.*

One jurisdiction has no right to sit in judgment on the jurisdiction of another Court in selection of its personnel in admitting members to its bar. The Supreme Court of the United States has expressed the view that they leave to the several states the task of admitting applicants to their respective Bars and rely upon their individual judgment as to training, learning, ability and character. Thus, its Rules for Admission to its Bar are uniform and all lawyers of every state are treated similarly. The United States District Court for the Southern District of California is in no position to state that only California lawyers are capable, able of good moral character and possess the requisite qualifications of learning and ability. To arbitrarily disqualify all lawyers except California lawyers, is to say that no other state except California can produce lawyers qualified to practice in the Federal Courts.

Assuming the State of California were to have a rule that before an applicant for admission to its Bar must first be a member of the Bar of the State of New York, it is plain to see that this law would be stricken down immediately. In the case of *In re Day*, 181 Ill. 73, the Court held:

“The right to practice law is a privilege, and a license for that purpose makes the holder an officer of the Court, and confers upon him the right to appear for litigants, to argue causes and to collect fees therefor, and creates certain exemptions, such as from jury service and arrest on civil process while attending Court. The law conferring such privileges must be general in its operation. No doubt the legislature, in framing an enactment for that purpose, may classify persons so long as the law establishing classes is general and has some reasonable relation to the end sought. There must be some difference which furnishes a reasonable basis for different legislation as to the different classes, and not a purely arbitrary one, having no just relation to the subject of the legislation. (*Braceville Coal Co. v. People*, 147 Ill. 66; *Ritchie v. People*, 155 Idaho 98; *Gulf, Colorado and Santa Fe Railroad Co. v. Ellis*, 165 U. S. 150.) The length of time a physician has practiced and the skill acquired by experience may furnish a basis for classification (*Williams v. People*, 121 Ill. 84), *but the place where such physician has resided and practiced his profession cannot furnish such basis and is an arbitrary discrimination making an enactment based upon it void.* (*State v. Pennoyer*, 65 N. H. 113.) Here, the legislature undertakes to say what shall serve as a test of fitness for the profession of law, and, plainly, any classification must have some reference to learning, character or ability to engage in such practice.” (Italics supplied.)

In denying appellant's application for admission to the Bar of its Court, the learned judge alluded to the reasons leading to the creation of the Court Rules in denying admission to its Bar to all attorneys, except those first admitted to the State Bar of California. These reasons are not sound and merely consists of rationalization for the rules rather than setting up a program for admission which would be uniform as to all lawyers of all jurisdictions. And, even if they were good reasons to be relied upon, it could almost, and in a sense, falls within the maxim of: "*When the reason for the law fails, the law itself fails.*" If this then be true, the law, if for no other reason, must be caused to fall.

For example the Court stated [R. 13]:

"From time immemorial it has been the recognized principle for the District Courts of the United States to have the right to determine the conditions upon which a person should be admitted to practice."

Appellant cannot agree with this general statement. This could be true, assuming one had never been admitted to practice before, in any jurisdiction whatever. But once a person has been admitted to practice in another jurisdiction the rules for admission to its Bar must be general and not special. And, even assuming *arguendo*, that the Court's postulate could be correct, it cannot arbitrarily discriminate against certain lawyers because of their former residence or place of practice. The right to regulate admission to the Bar does not give carte blanche authority to deny one's constitutional privileges and immunities or to deny equal protection of the law.

One objection in the main, raised by the Court, was that separating the Federal Court Bar in Southern California from the State Bar of the State of California,

would create a dual Bar membership. The argument advanced in favor of a single Bar, the State Bar of California, is that all members of the State Bar of California are subject to investigation before they are admitted and subject to examination to test their learning and ability. This is specious reasoning. First, another jurisdiction has already inquired into the character, learning and ability of the applicant seeking admission, and if this reliance is good enough for the Supreme Court of the United States, it should be good enough for a Court inferior to it. Moreover, there is nothing to stop the Court from setting up its own investigating body to determine the character, learning and ability of the applicant seeking admission. Then too, no matter how hard it tried the Court cannot get away from a dual bar membership. The very fact that admission is required to practice before it automatically creates a dual Bar. Otherwise, the Court would have a rule stating that members of the State Bar of California need not be admitted once they have been admitted to the State Bar of California. But the Supreme Court of the State of California in *Ex parte McCue, supra*, has stated that the State statutes regulating the practice of law are inapplicable to Federal Courts. Moreover, separate proceedings for disbarment are necessary in the Federal Courts when one has been disbarred in a State Court.

The argument of discipline is further specious. There are other Federal Court jurisdictions that have set up grievance committees for the disciplining of lawyers practicing in the Federal Courts. We have a good example of this in the very Court in which the application of appellant has been denied. The Honorable Judge Mathes summoned an attorney Maurice Levine, for conduct unbecoming an attorney and ordered his disbarment without first referring the matter to the State Bar of California.

This Court reversed the disbarment order. The Supreme Court of the United States has on its role of attorneys, members of the Bar of every State in the Union, yet it has no difficulty in entering an order to show cause why an attorney should not be disciplined for conduct unbecoming an attorney. Moreover, what is to prevent the Los Angeles Bar Association or the United States Attorney from instituting disciplinary proceedings against a lawyer for misconduct. He would be within their jurisdiction. For example, in the case of *Sacher v. Association of the Bar of the City of New York*, 347 U. S. 388, 74 S. Ct. 569, The Association of the Bar of the City of New York and the New York County Lawyers Association commenced the disciplinary proceedings in the United States District Court in which the lawyer was admitted to practice.

In the instant case, the Court further touched upon the point of learning and ability. Appellant does not believe, that this Court can, with complete candor, state and actually believe, that lawyers like Charles Evans Hughes, Justice Brandies, Justice Cardozo, Oliver Wendell Holmes, would not possess the ability to practice law in the United States District Court for the Southern District of California as against a young man of 21 years of age just admitted to practice law in the State of California. Take for example any lawyer of many years practice only in the Federal Courts has less ability than a lawyer newly admitted to practice in the State of California. Assuming also, that a lawyer having practiced nothing but Bankruptcy Law, or Admiralty Law, or Tax Law, or Federal Criminal Law all of his life and wishes to continue such practice in the Southern District of California, why should he be penalized by forcing him to be admitted to a State Court? Assuming he doesn't wish to be admitted to the

State Court, why should he be denied the right to practice his profession merely because he crossed a State line? Why should such a lawyer be denied the right to practice law merely because, some day, he may decide to take a case involving diversity of citizenship? Courts know that when one is trained in the law he knows where to find the answer to the questions. If this argument of the Court in the instant case is to hold true, then, in effect the United States District Court for the Southern District of California is saying to the United States Court of Appeals for the Ninth Circuit and to the Supreme Court of the United States, that only those judges admitted to the Bar of the State of California are capable of reviewing and reversing judgments entered in the United States District Court for the Southern District of California.

Actually and practically the Federal Courts should not be so agreeable to graciously hand a novice attorney the gift to practice law in its courts. There should be a complete separate independent Bar for those who do not care to practice in State Courts, just the same as a lawyer from California who doesn't care to practice law in any other jurisdiction. There should be a separate, independent Federal Bar, with rigid requirements for admission. High standards should be set, just the same as the several states set their own standards. The reasons for this are obvious. Handing a new lawyer freshly admitted to a State Bar a license to practice law in the Federal Courts is exactly the same as handing a new law student a license to practice in the State Courts.

The new lawyer freshly admitted to the State Bar is completely incapable of conducting a Federal Practice. *He is wholly unfamiliar with the Federal Rules of Civil and Criminal Procedure and more unfamiliar with Federal*



*Substantive law.* His only claim to the right, is that occasionally, he may get a case which involves state law; and this is so far and in between. But the Federal substantive and procedural law is as different and even more so than the laws of the different states. Tested by the same standards of examination as is given for admission to a state bar applicant, 99% of the lawyers would fail such an examination even if only 50% passing grade was required. The Federal law, substantive and procedural, is far more complicated than state law. Yet, the Court would deny admission to a well trained and experienced lawyer of Federal practice merely because of his place of residence. And, the judges of the Federal Courts, if the question were put direct to them, would readily admit that the average State lawyer, who only occasionally appears in the Federal Courts, is completely lost and inexperienced. Ask any State lawyer practicing law in the State of California to explain Rule 26, of the Federal Rules of Civil Procedure, which is elementary and simple enough, and very few will give you the correct answer.

As lawyers, we should be frank to admit, that the question is not one of character, learning and ability, but rather one of economics and jealousy. We of the legal profession ought to be above such things. The ethics of the profession demand it and our duty to the public requires it. In the case of *H. P. Hood v. Du Mond*, 336 U. S. 525, 69 S. Ct. 657, 664, 665, the Supreme Court of the United States held that if it were just a question of economics the law must be defeated and reversed on that ground. The court there held that one may engage in his business in any state and cannot be denied the license to so engage merely on the question of competition.

The Court was frank to admit the following [R. p. 16]:

“There is one exception that we make, and that is merely because the law so provides. A person who is an attorney for a governmental agency has the right to appear in our court, even though he not be a member of the local State Bar. For instance, we have had men in the Lands Division and men in the Anti-trust Division who have appeared before our courts, but that is merely because the law so recognizes. Furthermore, they recognize government attorneys to such an extent that even in the rules relating to criminal procedure provision is made that a government attorney may appear before the grand jury, *and a government attorney need not necessarily be a member of the Bar of the State.*” (Italics supplied.)

Why then, cannot a private litigant choose his own counsel the same as the government does? Why is the United States Government, as a litigant, accorded the privilege of selecting a lawyer, not a member of the State Bar of California, to appear in the United States District Court for the Southern District of California, *whereas a private litigant is denied this privilege?* If, as the Court says, this is the law, then all litigants should be treated equally before the law. This Court, in the case of *United States of America v. Amos R. Morin* (No. 14627), stated:

“Suppose the Standard Oil Company of California should move for an extension of time on the same grounds, namely, that for many years it had retained a number of attorneys too small for the proper conduct of its litigation, and they had been too busy in other matters for their client to care for a case in the Court of Appeals? *To drop into the vernacular, it is likely that the members of the Bar would indulge in*

*course laughter, knowing as they do that the United States is not a favored litigant in this court.”* (Italics supplied.)

The Rule of Court, pertaining to attorneys (1), clearly prohibits a local resident, a member of the Bar in good standing in another jurisdiction, from appearing in isolated cases in association with a local attorney. No leave *ex gratia* whatever is permitted. *But if he lived in another jurisdiction, leave ex gratia or appearance pro hoc vice would be permitted.* This punishes a lawyer for moving into a better climate. He may have to move for health reasons, but the rules of the United States District Court for the Southern District of California insist on making him sicker. Why should a lawyer be punished and penalized because he resides in one state and practices law in another? Why should a lawyer be forced to seek admission to one Bar in wishing to practice his profession in a completely other jurisdiction where he is wholly and completely qualified?

The Court, in denying admission to appellant herein, has affected the substantial rights of said appellant in contravention of Article I, Sections 8.9 and 10; Article III, Sections 1 and 2.2, Article IV, Sections 1 and 2.1, Article VI, Section 2, and Amendments V and XIV, of the Constitution of the United States of America.

Yet another paradoxical situation comes to the fore in the instant case before the Bar. Appellant is admitted to practice before the United States Court of Appeals for the Ninth Circuit, the said Court having appellate and supervisory jurisdiction of the United States District Court, Southern District of California. How can it be said that a lawyer has the right to appear in behalf of

a client, write briefs and argue the cause on an appeal, arising out of a judgment entered by the lower court, *and yet be denied the right to participate in the proceedings in the court below so as to protect the record?* The situation appears to be untenable, inconsistent and paradoxical. Suppose a lawyer was admitted to the Supreme Court of the State of California, but was not permitted to appear in the Superior Court, or Municipal Court of Los Angeles County, he would be in a rather awkward position. He has the right to appear before the highest court of a State but is denied the right to appear before the most inferior Court.

Certainly the history of the legal profession, and it is now universal, and is true in every State of the Union, that once a lawyer is admitted to practice in the highest Court of a State, he need not be specially admitted to the Bar of each Court within the State. He is automatically permitted to appear before any inferior Court of the State. The highest appellate jurisdiction of the Federal Court System is the Supreme Court of the United States; the immediate appellate and supervisory Court of the United States District Court, Southern District of California, is the United States Court of Appeals for the Ninth Circuit. Manifestly then, it should be axiomatic, that one admitted to practice before the Supreme Court of the United States shall automatically be permitted to practice before any Federal Court or administrative agency in the United States; and those lawyers admitted to any United States Court of Appeals shall be automatically permitted to appear before any Federal Court or Administrative Agency within its Appellate and Supervisory Jurisdiction.

**Conclusion.**

Appellant submits that the Court below erred in denying him admission to the Bar of the United States District Court for the Southern District of California. Appellant prays that the Court below be reversed with the direction and order to admit Ben Wasserman to the Bar of its Court.

Respectfully submitted,

BERTRAM S. HARRIS,

*Attorney for Appellant.*



No. 14762.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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In the Matter of the Application of

BEN WASSERMAN,

for Admission to the Bar of the United States District  
Court, for the Southern District of California,

*Appellant.*

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## BRIEF OF AMICI CURIAE FOR THE COURT.

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FILED

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PAUL P. O'BRIEN, CLERK





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No. 14762.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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In the Matter of the Application of

BEN WASSERMAN,

for Admission to the Bar of the United States District  
Court, for the Southern District of California,

*Appellant.*

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## BRIEF OF AMICI CURIAE FOR THE COURT.

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This is an appeal from an Order made by the United States District Court for the Southern District of California, Honorable Leon R. Yankwich, Chief Judge presiding, denying Appellant's motion that he be admitted to practice generally as an attorney before the District Court.

Counsel filing this brief as *amici curiae* do so with the express permission of this Honorable Court and the full knowledge, consent and approval of the Chief Judge of the United States District Court for the Southern District of California.

I.

**JURISDICTIONAL STATEMENT.**

**1. Basis of Jurisdiction of District Court.**

The District Court had jurisdiction to determine whether Appellant should or should not be admitted to practice before it by virtue of 28 U. S. C. A., Sec. 1654 and Sec. 2071, Federal Rule of Civil Procedure 83, and Rule 1 of the Rules of the United States District Court for the Southern District of California, *infra*, pages 10-12 of this brief, and also by virtue of the inherent power possessed by all Constitutional courts to determine the moral and professional qualifications of those who apply for admission to practice before them.

**2. Basis of Jurisdiction, if Any, of the Court of Appeals.**

Whether this court has jurisdiction to review the ruling appealed from is doubtful and unsettled.

Pursuant to Rule 18, subparagraphs 2(b) and 3 of this court, counsel make the following jurisdictional statement with respect to the claimed jurisdiction of this court to entertain this appeal. We do not take any position on the question but leave the determination thereof to this court with the following observations. We have found no decisions of the Supreme Court, or of any Court of Appeals expressly holding that an Order of a United States District Court denying admission to practice law before it is appealable as a final decision. The only reported cases hold that such an Order is not appealable.



The Constitution of the United States, Article III, Sec-1, provides that “judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”

Section 2 of Article III provides that “The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority,” and to all “cases” and “controversies” specifically enumerated therein.

Pursuant to these Constitutional provisions and by virtue of the Revised Judicial Code of 1948 (Act of June 25, 1948, c. 646, 62 Stat. 869, Title 28 of the United States Code) Section 1291, it is provided, in part:

“§1291. *Final decisions of district courts*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States,”

If this court has jurisdiction to review the Order appealed from, that jurisdiction must be conferred by Section 1291, *supra*, as a “final decision”.

Although Appellant in his Opening Brief states that jurisdiction is claimed by virtue of 28 U. S. C., Section 1292, that section is clearly inapplicable as the Order appealed from is not an interlocutory order of the type therein described.

A "case" or "controversy", as used in Section 2 of Article III of the Constitution, is generally considered as meaning the claims of litigants brought for determination by regular judicial proceedings established by law or custom and involving a genuine adversary issue between opposing parties. See discussion and authorities cited in 1 Cyc. Fed. Proc., Sections 2.13 and 2.14.

In the case of *Brooks v. Laws* (CA DC), 208 F. 2d 18, the court held that an order of the District Court denying a motion for admission to practice law before the District Court was not a final decision under 28 U. S. C. A., Section 1291 and was not appealable. The court held that the denial of an application for admission to practice by the District Court was a *ministerial act* performed by virtue of a *judicial power* rather than a *judicial proceeding* and was therefore not appealable. The court, however, treated the appeal as an application for a writ of mandamus, held it to be insufficient, and affirmed the order denying the motion to admit.

*In re Carter* (CA DC, 1951), 192 F. 2d 15, the court held that an order of the District Court denying an application to engage in the bonding business was not an appealable order and interpreted the Supreme Court decision in *In re Summers*, 325 U. S. 561, 89 L. Ed. 1795, as regarding an order denying admission to practice law in Illinois as a ministerial act which presented a controversy reviewable by the Supreme Court. The *Summers* case basically holds that an order of the Supreme Court of a state denying an application for admission to practice law

in that state was a case or controversy where it was asserted that the denial was based solely on the ground that the applicant was a conscientious objector and that such denial violated the Fourteenth Amendment. The Supreme Court of Illinois held that the proceedings denying the prayer for admission were not judicial and the United States Supreme Court accepted this as a conclusive determination of Illinois law.

In *In re Jacobi* (CA DC, 1954), 217 F. 2d 668, the court again held that denial of an application for admission was not appealable.

*Application of Fink* (9 Cir., 1953), 208 F. 2d 898, this court expressly withheld deciding whether an order denying a motion to admit to practice before the District Court of Alaska was appealable as a final decision.

*Application of Levy* (5 Cir., 1954), 214 F. 2d 331, referred to the *Brooks* case, *supra*, as holding that denial of such petitions were non-appealable but did not decide for itself whether the matter was appealable because the applicant had refused to avail himself of an opportunity to present evidence on his right to admission.

The foregoing authorities are called to the attention of the court without any position being taken by counsel as to whether the order is or is not appealable as a final decision within the meaning of 28 U. S. C., Section 1291, inasmuch as counsel feel that it is desirable that the basic question of the power and jurisdiction of the District Court to determine the qualifications of attorneys who seek to practice before it should be settled.

## II.

### SUMMARY OF ARGUMENT.

1. All federal constitutional courts have inherent and statutory power to determine the qualifications of applicants to practice law before them.

2. Rule 1, subdivisions (b) and (d), of the Rules of the District Court, prescribing the qualifications for admission to practice before the District Court, are constitutional, reasonable and nondiscriminatory.

## III.

### ARGUMENT.

**1. All Federal Constitutional Courts Have Inherent and Statutory Power to Determine the Qualifications of Applicants to Practice Law Before Them.**

That the courts of each jurisdiction have inherent power to determine the qualifications of applicants for admission to the bar is well established.

In 5 Am. Jur. (Attorney at Law), Sec. 19, p. 273, this general rule, supported by overwhelming authority, is stated as follows:

“§19. Generally.—Originally the courts alone determined the qualifications of candidates for admission to the bar, and this power still exists. It does not depend upon either the Constitution or statutes for its existence, but exists in all courts of record, unless restricted or taken away by express legislation. The courts have, however, generally acquiesced in all reasonable provisions relating to qualifications enacted by the legislature, so long as the rules and regulations prescribed are not unreasonable or do not deprive the courts of their inherent power to prescribe

other rules and conditions of admission to practice. The exercise of such power is held not to violate any constitutional or inherent prerogative of the court. There are, it is true, some courts which have taken the view that courts cannot add qualifications to those prescribed by the legislature, but must admit those shown to have the qualifications prescribed, but, as a general rule, the court will itself prescribe such other qualifications as may seem necessary to it in order to protect it, as well as the public at large, from persons of bad repute. In some jurisdictions the courts have even denied the existence of any power whatever in the legislature to prescribe what qualifications shall be prerequisite to admission of an attorney, especially if the legislature overrides the judicial department."

In *Application of Fink, supra*, this court said:

*"The court below assumed it had inherent power to admit to practice, but declined, as it had a right to do, to exercise that power."*

In *In re Secombe*, 60 U. S. 9, 19 How. 9, 15 L. Ed. 565, a petition for mandamus was sought to command the Judges of the Supreme Court of the Territory of Minnesota to vacate an order of that court removing Secombe from his office as an attorney of that court. The Supreme Court held that the determination of the qualifications of an attorney rested exclusively with the court involved and referred to an earlier case, saying (p. 13):

*"The removal of the attorney and counsellor, in that case, took place in a District Court of the United States, exercising the powers of a Circuit Court; and, in a court of that character, the relations between the court and the attorneys and counsellors who practise in it, and their respective rights and duties, are regulated by the common law. And it has been well*

*settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor and for what cause he ought to be removed.* The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court as the rights and dignity of the court itself."

In *Carver v. Clephane* (CA DC, 1943), 137 F. 2d 685, a proceeding brought in the District Court to compel the District Court's Committee on Admissions and Grievances to certify appellant for admission to the bar of the District Court, the District Court dismissed the complaint and on appeal the Court of Appeals affirmed, saying:

*"The matter concerns the integrity of the court's bar. Within very wide limits, standards of fitness for membership in the bar of the District Court are for the District Court itself to establish and maintain."*

In 7 C. J. S. (Attorney and Client), Sec. 7, p. 712, the rule supported by numerous authorities is stated to be:

*"The right to admission to practice is governed in every jurisdiction by the local statutory and constitutional provisions and rules of court and compliance with these requirements is prerequisite to the practice of law. The ultimate purpose of all regulations of the admission of attorneys is to assure the courts the assistance of advocates of ability, learning, and sound*

*character and to protect the public from incompetent and dishonest practitioners.*

*“In the federal courts, the qualifications for admission are prescribed by court rules, and, generally, a member of the bar of a state is admissible on motion on a proper showing of compliance with the rules.”*

And in Section 11, page 717, it is said:

*“The usage by courts of employing members of the bar to ascertain the qualifications and character of applicants for membership is reasonable and valid.”*

In 7 C. J. S., page 721, Section 15, it is said:

*“The admission to practice of attorneys admitted in another jurisdiction is generally authorized and regulated by statutes and rules of court in most jurisdictions, and compliance therewith is essential. While an attorney admitted to practice in one state has no absolute or constitutional right to be admitted on motion as an attorney in other states, the courts of most jurisdictions have followed the practice of admitting attorneys, without examination, on certificate of admission to the highest courts of other jurisdictions and proof of practice therein for a prescribed time.”*

In *Chudoff v. McGranery* (3 Cir., 1950), 179 F. 2d 869, the court said:

*“It appears that on May 9, 1949 Judge McGranery refused to permit Turner to enter a plea of ‘not guilty’ because he was represented by Mr. Chudoff. But on that date Mr. Chudoff was not entitled to appear on behalf of a client in the United States District Court for the Eastern District of Pennsylvania since he was not then a member of the bar of*

that court and entitled to practice law therein. *No constitutional question is presented on this issue for Mr. Chudoff, a member in good standing of the bar of the Supreme Court of Pennsylvania, prior to or upon May 9, 1949 could have become a member of the bar of the United States District Court for the Eastern District of Pennsylvania merely by having his admission moved therein and fulfilling other formal requirements. Mr. Chudoff effected membership to that bar without difficulty on May 16, 1949. The admission of an attorney to practice at the bar of a court, while a formal matter, is nonetheless a prerequisite of practice before that bar.*"

To the same effect are *Booth v. Fletcher*, 101 F. 2d 676; *Application of Fink*, 109 Fed. Supp. 728, aff'd 208 F. 2d 898; *Brooks v. Laws, supra*; and *Laughlin v. Clephane* (D. C., D. C.) 77 Fed. Supp. 103.

In addition to this inherent power possessed by the courts of each jurisdiction, Congress has specifically provided:

"28 U. S. C. §1654. *Appearance personally or by counsel.*

*"In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."*

It has been held that this statute confers exclusive jurisdiction on the United States District Courts for each district to determine and prescribe rules governing the qualifications of attorneys to practice before them. (*In re Shorter* (D. C. Ala., 1865), 22 Fed. Cases No. 12811; *Laughlin v. Clephane* (D. C., D. C., 1947), 77 Fed. Supp. 103; and *Brooks v. Laws, supra*.)



28 U. S. C. A., Section 2071, specifically confers upon the Supreme Court, all Courts of Appeal, and all District Courts, the power of prescribing rules for the conduct of the business of those courts. Section 2072 empowers the Supreme Court to prescribe general rules governing the practice and procedure in District Courts.

Pursuant to these statutes, Rule 83 of the Federal Rules of Civil Procedure, adopted and approved by the Supreme Court, provides:

“Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.”

2. **Rule 1, Subdivisions (b) and (d), of the Rules of the District Court for the Southern District of California, Prescribing the Qualifications for Admission to Practice Before the District Court, Are Constitutional, Reasonable and Nondiscriminatory.**

Pursuant to the foregoing statutes and rules, the United States District Court for the Southern District of California adopted Rule 1 providing the qualifications for applicants for admission to practice before that court. Rule 1 provides in part as follows:

“(b) Attorneys—Admission: Attorneys residing within the State of California desiring to apply for admission to practice in this court shall be admitted only upon a written motion made in their behalf and

signed by a member of the bar of this court certifying that the applicant for admission is an active member, in good standing, of The State Bar of California and is a person of good moral character.”

“(d) Non-Resident Attorneys: Only a member of the bar of this court may enter appearances for a party, sign stipulations or receive payment or enter satisfaction of judgment, decree or order. However any member in good standing of the Bar of any United States court, or of the highest court of any State or of any Territory or Insular possession of the United States, who has been retained to appear in this court, and who is not a resident of this district, or does not maintain an office in this district for the practice of law, may be permitted after application, without previous notice, to appear and participate in a particular case. Such applicant shall designate, in his application so to appear, a member of the bar of this court who maintains an office in this district for the practice of law, with whom the court and opposing counsel may readily communicate regarding the conduct of the case. He shall also file with such application the address, telephone number and written consent of such designee. Such permission to appear being a limited one, no certificate of admission shall be issued by the Clerk.”

The form of written motion provided for by Rule 1(b) is as follows:

“MOTION FOR ADMISSION TO PRACTICE.

“This.....day of.....19.... I move the above-entitled Court to admit to practice as an attorney and counselor of said Court..... who I certify is now an active member, in good standing, of The State Bar of California.

“I vouch for applicant’s good moral character,  
.....”

Under Rule 1(b) there are three requirements which an applicant for admission to practice must establish to the satisfaction of the District Court: (1) He must be a resident of California, (2) he must be an active member in good standing of the State Bar of California, and (3) he must be a person of good moral character.

Applicant failed to comply with the second requirement because he was not a member in good standing of the State Bar of California and had never been admitted to practice law in California.

Not having been admitted to practice in California, the appellant, if a non-resident of California, could be permitted by the District Court, after application, to appear and participate as counsel in a particular case upon complying with Rule 1(d).

A similar rule adopted by the United States District Court for the Southern District of New York was recently considered by that court in the case of *Piorkowski v. Arabian American Oil Company* (S. D., N. Y., 1955), 131 Fed. Supp. 553, where the court held that a non-resident attorney who was admitted to practice in the Southern District of New York but not in the State courts of New York, would be violating the penal law of New York if he maintained an office for the practice of law in New York.

The penal statute of New York, referred to in that opinion, is similar to the California law, Business and Professions Code, Sections 6125 and 6126. California Business and Professions Code, Section 6126, provides as follows:

“§6126. *Unauthorized practice or advertising as misdemeanor.* Any person advertising himself as

practicing or entitled to practice law or otherwise practicing law, after he has been disbarred or while suspended from membership in the State Bar, or who is not an active member of the State Bar, is guilty of a misdemeanor.”

To be a member of The State Bar of California an attorney must possess the qualifications prescribed by California Business and Professions Code, Section 6060. That section requires that the applicant be a citizen of the United States, at least 21 years of age, of good moral character, a bona fide resident of California for at least three months prior to the date of the final bar examination and to have completed at least two years of college work or comply with the other requirements of that section, and to have taken and satisfactorily passed a final bar examination given by an examining committee.

Under Business and Professions Code, Section 6062, an attorney who has been admitted to practice law in another state may be admitted to practice in California if he possesses the same citizenship, age, good moral character and residence requirements prescribed by Section 6060, has been admitted to practice before the highest court of a sister state or of any jurisdiction where the common law of England constitutes the basis of jurisprudence and has been actively and substantially engaged in the practice of law in any such jurisdiction for at least four years out of the six years immediately preceding the filing of the application for admission and if he shall have taken and passed such examination as in the discretion of the examining committee may be required.

The record does not disclose that appellant qualified for admission to practice in California under either of these two sections.

There are many attorneys admitted to practice in sister states who have moved to California and been admitted to practice here under the provisions of Section 6062 by the taking and passing of the attorney's examination and establishment of the remaining qualifications.

There is nothing unconstitutional, arbitrary or unreasonable in a court requiring that an applicant to practice law shall possess learning in the law of that jurisdiction where he seeks admission. It is well known that different states have prescribed different qualifications and that the standards for admission to practice in the various states have generally been made higher.

The various federal courts have generally not conducted examinations as to the qualifications of applicants for admission but have adopted as a prerequisite the standards prescribed by the rules of the Court to which the application is made.

Thus in *Re Isserman* (1953), 345 U. S. 286, 287-288, 97 L. Ed. 1013, the Supreme Court not only recognized and approved of this practice but also recognized that there was no vested right in an individual to practice law. In that case Mr. Isserman had been a member of the bar of New Jersey and also of the United States Supreme Court. He was disbarred by the Supreme Court of New Jersey and thereupon a rule to show cause why he should not be disbarred was issued by the United States Supreme Court. The Supreme Court said:

*"This Court (as well as the federal courts in general) does not conduct independent examinations for admission to its bar. To do so would be to duplicate needlessly the machinery established by the states whose function it has traditionally been to determine who shall stand to the bar. Rather our rules provide*

for eligibility in our bar of those admitted to practice for the past three years before the highest court of any state. *The obvious premise of the rule is the confidence which this Court has in the bars maintained by the states of the Union.*

\* \* \* \* \*

“Disbarment by a state does not automatically disbar members of our bar, but this Court will, in the absence of some grave reason to the contrary, follow the finding of the state that the character requisite for membership in the bar is lacking (*Selling v. Radford*, 243 U. S. 46, 61 L. ed. 585, 37 S. Ct. 377, Ann. Cas. 1917D 569 (1917)). But we do not follow the rule used in some state courts that disbarment in a sister state is followed as a matter of comity.”

And again the Supreme Court said:

*“There is no vested right in an individual to practice law. Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice.”*

Thus, the United States Supreme Court has expressly recognized and approved of the practice adopted by the various federal courts whereby admission to practice before the highest court of the state in which the applicant resides is a prerequisite to admission, and that each Court has the right to determine by rule or otherwise what the required qualifications shall be.

Appellant has cited no authority holding that Rule 1(b) and (d) of the District Court is unconstitutional, unreasonable or arbitrary.

In *Ex parte Garland*, 4 Wall. 378, 18 L. Ed. 370, the Supreme Court said:

“The profession of an attorney and counselor is not, like an office, created by Congress, which depends for its continuance, its powers and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counselors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. *They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character; . . .* they hold their office during good behavior and can only be deprived of it for misconduct ascertained and declared by the judgment of the court, after opportunity to be heard has been offered.”

In *Bradwell v. Illinois*, 16 Wall. 130, 83 U. S. 130, 21 L. Ed. 442, Mrs. Bradwell, a resident of Illinois, applied to the Judges of the Supreme Court of that state for a license to practice law. The Illinois Constitution limited the right to practice law to males. She argued that the denial of the license violated the second section of the Fourth Article of the Constitution of the United States, and the Fourteenth Amendment to the Constitution. In rejecting these arguments the Supreme Court said:

“As regards the provision of the Constitution that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, the plaintiff in her affidavit has stated very clearly a case to which it is inapplicable.

“The protection designed by that clause, as has been repeatedly held, has no application to a citizen of the state whose laws are complained of. If the plaintiff was a citizen of the state of Illinois, that provision of the Constitution gave her no protection against its courts or its legislation.

\* \* \* \* \*

“In regard to that Amendment counsel for the plaintiff in this court truly says that there are certain privileges and immunities which belong to a citizen of the United States as such; otherwise it would be nonsense for the 14th Amendment to prohibit a state from abridging them, and he proceeds to argue that admission to the bar of a state, of a person who possesses the requisite learning and character, is one of those which a state may not deny.

“In this latter proposition we are not able to concur with counsel. We agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a state is forbidden to abridge. *But the right to admission to practice in the courts of a state is not one of them.* This right in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any state or in any case to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in the state and Federal courts, who were not citizens of the United States or of any state. But, on whatever basis this right may be placed, so far as it can have any relation to citizenship at all, it would seem that, as to the courts of a state, it would relate to citizenship of the state, and as to Federal courts, it would relate to citizenship of the United States.”



To the same effect is *In re Lockwood*, 154 U. S. 117, 38 L. Ed. 930.

In this case Mr. Wasserman claims to be a citizen and resident of California and the holding of the above cases is applicable.

In *Mitchell v. Greenough* (9 Cir., 1938), 100 F. 2d 184, this Court said:

“We pause here to observe that the right to practice law in the state court has been held by the Supreme Court not to be a privilege granted by the Federal Constitution or laws. *Bradwell v. State of Illinois*, 16 Wall. 130, 21 L. Ed. 442; *Ex parte Lockwood*, 154 U. S. 116, 14 S. Ct. 1082, 38 L. Ed. 929. In *Green v. Elbert*, 8 Cir., 63 F. 308, the Circuit Court of Appeals held that the conspiracy to deprive a lawyer of his rights to practice law in the state courts was not a conspiracy to interfere with any right or privilege ‘granted, secured or protected by the Constitution of the United States.’”

In *Brents v. Stone* (D. C., E. D. Ill., 1945), 60 Fed. Supp. 82, the plaintiff sought declaratory judgment against the Justices of the Illinois Supreme Court to the effect that the statute, and rules adopted by the Court, governing admissions to the bar in Illinois deprived him of the right to practice law which he asserted was a privilege guaranteed and protected by the Federal Constitution. The Court, in rejecting this argument, said:

“Nor can the action be sustained as one to secure protection of civil rights under the Federal Constitution, for a license to practice law is not a privilege within the purview of any constitutional provision. *Mitchell v. Greenough*, 9 Cir., 100 F. 2d 184, rehearing denied 9 Cir., 100 F. 2d 1006; certiorari denied 306 U. S. 659, 59 S. Ct. 788, 83 L. Ed. 1056;

Bradwell v. Illinois, 16 Wall. 130, 83 U. S. 130, 21 L. Ed. 442; *In re Lockwood*, 154 U. S. 116, 14 S. Ct. 1082, 38 L. Ed. 929. The police power of Illinois extends to the control of every action and event on the part of its citizens having to do with the public welfare. *It is well within the prerogatives of the commonwealth to prescribe regulations founded on nature, reason and experience for the admission of qualified persons to professions and callings demanding special skill.* In pursuance of this power the state has seen fit to prescribe *certain reasonable requirements for admission to the bar, including an examination as to fitness to practice law.* In the absence of averment and proof of unreasonable or arbitrary action, no citizen has ground for complaint. Bradwell v. Illinois, 16 Wall. 130, 83 U. S. 130, 21 L. Ed. 442, affirming *In re Bradwell*, 55 Ill. 535."

In *Application of Levy* (5 Cir., 1954), 214 F. 2d 331, it is held that a United States citizen has no constitutional right to practice law in the Federal Courts.

In *Keeley v. Evans* (D. C. Ore., 1921), 271 Fed. 520, it is held that there is no right, privilege or immunity involved in the action of a state court in refusing to admit to practice law before it an applicant who is licensed to practice before the Court of a different state, and that there is no violation of the equal protection clause in that the applicant, like all other persons wishing to be admitted to practice, can be required to show to the satisfaction of the Court his moral and professional fitness.

In *Emmons v. Smitt* (E. D. Mich., 1944), 58 Fed. Supp. 869, aff'd (6 Cir., 1945), 149 F. 2d 869, it is held that the right to practice law is not a property right nor is it a privilege or immunity secured by the Federal Constitution.

In *State v. Rosencrans* (1910), 30 R. I. 374, 75 Atl. 491, 498-500, aff'd *per curiam* (1912) 225 U. S. 698, the defendant in a criminal case was charged with practicing dentistry without a license. He contended that the Rhode Island statute requiring him to be licensed even though he had been previously licensed in other states was unconstitutional under the privileges and immunities, the full faith and credit, and the due process clauses of the Constitution. The Court held that the statute did not violate any of these clauses and stated:

“There is nothing in either of these sections of the statute *which directly or indirectly prevents the certificates of boards of registration in dentistry of other states from being accepted in this state as evidence of the fact that the person holding those certificates is a duly registered dentist in the state from which the certificate issued.* That is all the faith and credit which under the opinions in this state is required to be given such records by this provision of the federal Constitution. *No state has such extra-territorial jurisdiction that it can by its certificate confer upon the person named therein the right to practice his profession in another state.*”

The above authorities establish that the Courts of each jurisdiction have the power to determine the legal and moral qualifications of those seeking the right to practice before them.

Although Appellant asserts that the District Courts in the several districts are in effect branches of one nation-wide District Court, such is not the fact. Under 18 U. S. C., Sections 132 and 133, it is provided that there shall be a District Court in each judicial district known as the United States District Court for that district and

that the President shall appoint "district judges for the several districts."

The Federal District Courts for the several districts are not branches of one nation-wide District Court, but each has been specially created pursuant to constitutional authorization and each is separate from the other. The Federal District Courts in the different states are foreign to each other in as full a sense as are state courts of different jurisdictions. (*United States v. Bink* (D. C. Ore., 1947), 74 Fed. Supp. 603, 607-608, and authorities there cited.)

Each Federal District Court in each judicial district has jurisdiction throughout and territorially coextensive with that district and no one District Court has any power to prescribe rules governing the District Courts of other districts. (36 C. J. S. p. 507, Sec. 303.)

It is well established that an applicant for admission to the practice of law must possess the requisite ability and legal learning, to test which he must submit himself to an examination either by the Court itself or by duly appointed examiners. A wide discretion is vested in the examiners and the exercise of that discretion is generally not reviewed by the Courts, unless there is a clear abuse thereof. (7 C. J. S. 716, Sec. 10, citing *In re Ellis*, 203 Pac. 967, 118 Wash. 484; *Rosenthal v. State Bar Examining Committee*, 165 Atl. 211, 116 Conn. 409, 87 A. L. R. 991; *In re Wilson*, 253 P. 2d 433, 435, 76 Ariz. 419, and other authorities.)

The District Court by Rule 1(b) has in effect determined and selected the Supreme Court of the State of California as an examining Court to determine the qualifications of those who should be admitted to practice in California.

The State Bar of California does not admit applicants to practice in the State courts. It only investigates the legal and moral qualifications of applicants as “an arm of the Court” and recommends to the Supreme Court whether the applicants possess the required legal learning and moral character to become members of the bar. The final determination of qualifications is made by the Supreme Court itself. Any applicant who is dissatisfied with the refusal of the Committee of Bar Examiners to certify him for admission to practice law, may have the Committee’s action reviewed by the Supreme Court. (Cal. Bus. and Prof. Code, Sec. 6066; *In re Investigation of Conduct of Examination for Admission to Practice Law*, 1 Cal. 261; 6 Cal. Jur. 2d (Attorneys at Law), Secs. 15, 20, 22, 41-44, pp. 143, 147-149, 175-178.)

There is nothing arbitrary or unreasonable in requiring that an applicant for admission to practice law in a United States District Court in California shall possess learning in the laws of California and be required to pass an examination thereon.

Knowledge of the laws of the state in which the District Court is situated is essential because the State law is the rule of decision in the Federal Court for that district except in a limited class of cases. (28 U. S. C. A., Sec. 1652.)

Since, except where the Federal Constitution, statutes or treaties otherwise require, the applicable state law constitutes the rule of decision in the Federal Court not only as to the statutes of that state but also as to the non-statutory law (*Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188; *Angel v. Bullington*, 330 U. S. 183, 91 L. Ed. 832), a rule, such as Rule 1(b) of the District

Court, requiring learning in California substantive law, is reasonable.

The rule that the State law governs in Federal cases where it is applicable and where the Federal Constitution, statutes or treaties are not applicable, is followed with respect to rights and privileges, interests in property, causes of action and liabilities, injuries to rights, negligence or contributory negligence, rights under, and the construction of contracts. See cases collected in 3 Cyc. Fed. Proc. (3rd Ed.), Sec. 6.12, and 28 U. S. C. A., Sec. 1652.

In 3 Cyc. Fed. Proc. (3rd Ed.), Secs. 6.13 and 6.14 it is stated that in cases in the Federal courts under the Federal Tort Claims Act, the Federal Employers' Liability Act, and the Bankruptcy Act, the law of the State must be applied in determining the rights and liabilities of the respective litigants and their property rights.

Appellant refers to attorneys practicing bankruptcy law, patent law and tax law as though a separate branch of Federal law was applicable. But in these cases the property rights of the litigants are governed by the State law and the contracts involved in patent, bankruptcy and tax cases are interpreted and governed by the State law. See authorities collected in 35 C. J. S. (Federal Courts), Sections 165-180.

Moreover, an attorney admitted to practice in the United States District Court for the Southern District of California, under Rule 1(b), does not receive a license

limiting his practice to those specific types of cases involving a Federal question or a specific kind of case, such as admiralty, patent, bankruptcy, or tax litigation. His license is general and entitles him to practice all types of law including those cases where the state law of California is the rule of decision. A rule which requires learning in the California substantive law as a prerequisite to admission to practice before a Federal District Court in California is certainly reasonable and within the power of the Court to adopt.

In his Brief Appellant cites various provisions of the United States Constitution as being violated by the rule of the District Court (Br. pp. 8-10) but he fails to cite any authorities supporting his statements.

The case of *Cummings v. Missouri*, 4 Wall. 321, 71 U. S. 277, 18 L. Ed. 356, was one in which the defendant, a Roman Catholic priest, was convicted for performing his duties as a priest without having taken a certain loyalty oath. The Supreme Court held that the test oath imposed by the Missouri Constitution was void as a bill of attainder or *ex post facto* law.

Appellant in his brief, pages 11-12, quotes from *Bradwell v. Illinois*, 16 Wall. (U. S.) 130 and says "in that case it was therein stated." The quoted language is not a part of the opinion of the Supreme Court. On the contrary, the statements there quoted in Appellant's Brief are a part of the argument of the attorney for the plaintiff in error. This is manifest from the report of the case in 21 L. Ed. 442, at 443.

In each of the cases cited by Appellant in his Brief, pages 12 and 13, the Court expressly recognized that it rested exclusively with the courts to determine who is qualified to become one of its officers as an attorney.

At page 16 Appellant states that "There is nothing to stop the Court from setting up its own investigating body to determine the character, learning and ability of the applicant seeking admission." That is exactly what the Court has done by the provisions of Rule 1. It has determined that the investigating body shall be the State Board of Bar Examiners and that when that Board's recommendations have been accepted and approved by the Supreme Court of California they will be accepted by the District Court as a determination of the character, learning and ability of the applicant. This practice has been expressly approved by the United States Supreme Court in *In re Isserman, supra*. The provisions of the California law governing admissions to practice have been held not to constitute an unconstitutional delegation of power (*Barton v. State Bar*, 209 Cal. 677) or a violation of Section 1 of Article III of the State Constitution relative to the distribution of governmental powers. (*In re Shattuck*, 208 Cal. 6; 6 Cal. Jur. 2d 141-143, 148, 173, 175-178.)

In his Brief Appellant makes reference to well-known judges who would be required to qualify under Rule 1 in order to practice law in California in the Federal courts. Those judges, if they resigned or retired from the bench and desired to practice law in California, would have



the right to apply for admission to practice in the State courts of California by taking the attorney's examination. California Business and Professions Code, Section 6062, subdivision (e), provides that in the case of out-of-state attorneys, teaching in a law school accredited by the Committee and services as a judge of a court of law shall be considered the practice of law within the meaning of that section. The qualifications of judges of Federal courts are determined by the Congress and are not for consideration in this proceeding.

With respect to Appellant's comments upon young attorneys admitted to practice in the Federal courts by reason of the fact that they have been admitted in the California state courts, it is sufficient to say that it is for the Court to determine the standards of qualifications. Those attorneys have taken and passed an examination as to their legal and moral qualifications. The Appellant has the privilege of doing the same. If Appellant, as implied in the Brief, is a well-trained and experienced lawyer of Federal practice, and if he meets the requirements of California Business and Professions Code, Section 6062, and has actively and substantially engaged in the practice of law in any jurisdiction or jurisdictions where the common law of England constitutes the basis of jurisprudence for at least four out of the six years immediately preceding the filing of his Application, we wonder why he has not applied for admission to practice law in California. If he meets the test he would be admitted, if he does not meet the test he would not be.

IV.

**TREATED AS A PROCEEDING FOR LEAVE TO  
FILE A MOTION FOR WRIT OF MANDAMUS,  
THE MOTION SHOULD BE DENIED.**

If the proceeding before this Court be treated as an application for a writ of mandamus, it is clearly insufficient under the well-established rules governing the issuance of such writs under 28 U. S. C. A., Section 1651.

It is well established that mandamus is an extraordinary writ reserved for extraordinary cases, to be used sparingly and only under exceptional circumstances. (*Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041.) A petition for a writ of mandamus should allege facts clearly showing that the lower court is acting clearly without jurisdiction, that a plain legal duty rests on the respondent to perform the acts sought to be performed, that the petitioner is entitled to have that duty performed, that the respondent has refused or failed to perform the act in question, and that the petitioner has no adequate or ordinary remedy at law. Mandamus will not issue to a subordinate judicial tribunal to exercise its judicial functions and perform its judicial duties, or exercise its judicial discretion in a particular way or manner, or to reach a designated conclusion, or make a particular decision, or to reverse or change a conclusion reached or decision made by it on a question within its jurisdiction. (*Roche v. Evaporated Milk Association*, 319 U. S. 21, 87 L. Ed. 1185; *Bankers Life & Casualty Company v. Holland*, 346 U. S. 379, 98 L. Ed. 106; 55 C. J. S. (Mandamus), Sections 51, 71 and 265.)

If it is asserted that the lower court has abused its judicial power the petitioner must establish a clear abuse of that power. It is within the sound discretion of the Court of Appeals to determine whether it should exercise its discretion to entertain the application for the writ. (*Brooks v. Laws, supra*; Application of Williams (9 Cir.), No. 14894 decided Nov. 8, 1955, not reported; O'Brien Manual of Federal Appellate Procedure, 3rd Ed., p. 251, Rules 30 and 31 of the United States Supreme Court.)

It is respectfully submitted, for the reasons above set forth, that the appeal should be denied, and the Order affirmed if it be an appealable Order, and the application for writ of mandamus dismissed if the proceeding be treated as such an application.

Respectfully submitted,

EUGENE M. PRINCE,

J. E. SIMPSON,

PETER E. GIANNINI,

MICHAEL G. LUDDY,

*Members of the State Bar of California.*

*Amici Curiae for the Court.*



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IN THE  
United States  
**Court of Appeals**  
For the Ninth Circuit

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MARTHA M. KIRK, an adult, and KENNETH  
WILLIAM KIRK, a minor, who sues by his Guard-  
ian Ad Litem, Martha M. Kirk,

*Appellants,*

vs.

UNITED STATES OF AMERICA,

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**BRIEF FOR APPELLEE**  
**UNITED STATES OF AMERICA**

---

*On Appeal from the United States District Court  
for the District of Idaho*

---

SHERMAN F. FUREY, JR.

*United States Attorney*

By

JOHN T. HAWLEY,

*Assistant United States Attorney*

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Filed....., 1955

..... Clerk

**FILED**

**OCT 10 1955**

PAUL P. O'BRIEN, CLERK



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*United States Attorney*

By

JOHN T. HAWLEY,  
*Assistant United States Attorney*

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**BRIEF FOR APPELLEE**  
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*On Appeal from the United States District Court  
for the District of Idaho*

---

**STATEMENT OF THE CASE**

The appellee, United States of America, defendant in the proceedings below shall be referred to as the "Government."

Jurisdiction of the Court is admitted and properly shown in appellants' Brief.

In the proceedings below, the Court granted a motion made by the Government for a Summary Judgment based upon the pleadings on file at the time

the motion was made. As stated by appellants, this appeal is taken from the Order denying the Motion for Leave to Amend Plaintiffs' Complaint, which motion was made after the Court's Opinion granting the Summary Judgment was entered of record, and from the entry of Summary Judgment itself.

Because of the manner of presentation of appellants' Statement of Facts in their Brief, we will briefly outline in chronological order the pleadings filed and the pertinent portions of those pleadings applicable to this appeal.

On February 23, 1954, a Complaint was filed by appellants in the United States District Court, Southern Division, Boise, Idaho, seeking damages from the Government for the wrongful death of one William M. Kirk. Among other things, the Complaint alleges, in part, as follows:

1. Paragraph III:

"That the defendant, United States of America . . ., *was engaged in the construction of a dam under the Lucky Peak Dam Project on the Boise River. . .*" (R. 5)

2. Paragraph V:

"That the deceased, William M. Kirk, was employed as a carpenter upon the Lucky Peak Dam Project by Bruce Construction Co., and Russ Mitchell, Inc., *which said parties were contractors performing work . . . for the defendant, and under contract to said defendant;*" (R. 5)

## 3. Paragraph VII:

“That said Lucky Peak Dam, the control works, and the land occupied thereby *were in the possession of and under the control, dominion and authority of the said defendant, the United States of America.*” (R. 6)

## 4. Paragraph VIII:

“; . . . That Major Graham Emore, USA, acting within the scope of his employment with defendant, was present *and supervising the work; . . .*” (R. 7)

## 5. Paragraph IX:

“ . . . That thereunder the defendant *exercised complete dominion, control and authority over the premises of the Lucky Peak Dam, and having through the Department of Army, Corps of Engineers, prepared the design, specifications and plans of said Lucky Peak Dam, was engaged within the scope of said authority in the detailed supervision of the construction of said dam through its employees in the Lucky Peak Dam Project;—*These employees of the Government, *engaged in the supervision of the construction of the dam, and within the scope of their employment carelessly, heedlessly and negligently by act and omission failed to perform their duties under the statutes and regulations of the United States, and carelessly, heedlessly and negligently by act and omission failed to provide a reasonably safe place for said*

William M. Kirk to work, thereby causing the injury and death of said William M. Kirk.” (R. 8)

Interrogatories and Admissions were filed by the appellants of the Government on May 6, 1954. (R 13, 14, 15, 16, 17, 18) The Answer and Response of the Government were filed on June 30, 1954. (R 28, 29, 30, 31, 32, 33, 34) The Government in its response to appellants’ Request for Admissions denied that the United States of America was exercising complete dominion, control and authority over the premises of Lucky Peak Dam on May 10, 1953, the date of the accident, and denied that the Government, through its employees and officers, was engaged within the scope of its authority in the detailed supervision of the construction of Lucky Peak Dam.

Answering Interrogatories one and two (R. 29) the Government stated that none of its employees had general management and control of the actual construction of the control tower of Lucky Peak Dam in May of 1953; that the work was being done by certain contractors, who possessed such general management and control; and that no employees of the Government were employed in work on the construction of the control tower in May of 1953. Answering Interrogatory No. 19, (R. 32) the Government stated that Mr. Grahm Emore was not acting in a supervisory capacity of the work being done by the contractors’ employees on the dam, but that he was engaged in inspecting certain cement operations conducted at that time. Answering Interrogatory No. 23, (R. 32)

the Government stated, in effect, that the premises were owned by the United States of America but that certain areas were allocated to the contractors in which to perform their work, and that any control and authority of those areas was subject to the terms of the contract.

On June 14 and 15, 1954, respectively, the Government filed Interrogatories and Requests for Admissions of the appellants (R 24, 25, 26), which were answered on July 8, 1954 (R 36, 37, 38, 39, 40), eight days *after* the appellants had received the Government's Answer to Interrogatories and its Response to Admissions. Answering the Government's Request for Admissions Nos. 4, 5 and 6, at that time appellants denied that the Government did not have the right to direct, supervise or control the work of deceased.

Answering the Government's Interrogatory requesting, in effect, a full statement of the wrongful acts and omissions of the Government and its employees along with the names of the employees, appellants set forth (R. 38 and 39) failure to inspect; failure to provide safety apparatuses; failure to provide rescue equipment; failure to provide rescue procedures; failure to rescue the deceased; and the failure to carry out and enforce the safety practices, in violation of the statutes of the United States of America as constituting the negligence upon which this action is based.

Appellant further stated:

“That the above careless, heedless, and negligent acts and omissions are those of Walter J. Murphy, project engineer of defendant, *in charge locally of the construction of said project*; . . . and other employees of the U. S. Army Corps of Engineers whose names plaintiff does not know, but who prepared the plans and specifications of the control tower, who directed the contractor to provide safety measures, held conferences as to safety measures, supervised, inspected and checked the safety practices on the job, took pictures of the safety practices (attended safety meetings) and made reports to the defendant and its employees as to safety practices, . . .”

On July 12, 1954, the Government moved for a Summary Judgment, based upon the pleadings, admissions, interrogatories, and certified copy of the contract filed in the case. The Court, after hearing oral argument and having before it extensive briefs of counsel, on September 20, 1954, entered a Memorandum Decision granting the Motion for Summary Judgment.

On September 21, 1954, the appellants moved to amend their Complaint.

On March 3, 1955, after hearing oral arguments and upon written briefs from counsel, the Court denied the plaintiffs' Motion to Amend the Complaint, and on March 8, 1955, Summary Judgment was entered.



## SUMMARY OF APPELLEE'S POSITION

The granting of the Government's Motion for Summary Judgment was proper and the Memorandum Decision of the lower Court correctly states the applicable law to this case.

We hesitate to attempt to improve or supplement the lower Court's decision, because standing alone it meets the majority of arguments raised by appellants. We will, however, set forth as briefly as possible the Government's position as against the major contentions made by appellants in their Brief.

Under the Federal Tort Claims Act the Government has consented to be sued for torts committed by it in the same manner and to the same extent *as a private individual would be liable under the circumstances.*

That liability is to be determined by the *law of the place where the tort is committed as it would apply to a private person under the same circumstances.*

Under the allegations of the Complaint, the Government was engaged in the construction of a dam, owned the land upon which the dam was being built and actually supervised and controlled and exercised dominion over the construction work on the dam.

The deceased lost his life while engaged as an employee of the contractor operating under the supervision, dominion and control of employees of the Government.

The appellants received compensation benefits from the contractor, or its surety, for the death of

William M. Kirk under the provisions of the Idaho Workmen's Compensation Act.

Payment made to appellants under the Idaho Workmen's Compensation Act is an exclusive remedy, and all other rights and remedies on account of the death of William M. Kirk except those remedies which might accrue against a third-party tort-feasor are barred.

If the Government were a private person operating under the Idaho Workmen's Compensation law, and under the circumstances of this case, it would be classified as an employer.

An individual standing in the position of the Government would, therefore, have the defense of the payment to appellants under the Idaho Workmen's Compensation Act of compensation benefits for the death of deceased.

Such a payment would be an exclusive remedy for the appellants and would bar recovery in this case.

## I

THE GOVERNMENT HAS CONSENTED TO BE SUED FOR TORTS COMMITTED BY IT IN THE SAME MANNER AND TO THE SAME EXTENT AS A PRIVATE INDIVIDUAL WOULD BE LIABLE UNDER THE SAME CIRCUMSTANCES AND UNDER THE LAW OF THE STATE WHERE THE TORT WAS COMMITTED.

28 USCA, Section 2674, provides, in part, as follows:

“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. . . .”

28 USCA, Section 1346(b), provides, in part, as follows:

“Subject to the provisions of Chapter 171 of this Title, the District Courts, . . . , shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . , for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”

## II

UNDER THE FACTS AND CIRCUMSTANCES IN THIS CASE THE GOVERNMENT IF A PRIVATE INDIVIDUAL WOULD BE CLASSED AS A STATUTORY EMPLOYER UNDER THE IDAHO WORKMEN'S COMPENSATION ACT AND THE IDAHO DECISIONS INTERPRETING THAT ACT.

Section 72-203, I.C., provides as follows:

“The rights and remedies herein granted to an employee on account of a personal injury for which he is entitled to compensation under this act *shall exclude all other rights and remedies of such employee, his personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury.*”

Section 72-811 I.C., provides as follows:

“An employer subject to the provisions of this act, shall be liable for compensation to an employee of a contractor or sub-contractor under him or who has not complied with the provisions of Section 72-801 in any case where such employer would have been liable for compensation if such employee had been working directly for such employer. The contractor or sub-contractor shall also be liable for such compensation, but the employee shall not recover compensation for the same injury from more than one party. . . .”

Section 72-1010, I.C., provides as follows:

“ ‘Employer,’ unless otherwise stated, includes any body of persons, corporate or unincorporated, public or private, and the legal representative of a deceased employer. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor, or for any other reason, is not the direct employer of the workmen there employed.

If the employer is secured it includes his surety so far as applicable.”

Appellants argue that since the United States of America is a sovereign power as such it is not subject to local Workmen's Compensation laws. For this reason, they say the Government cannot claim the defenses to which an employer under local law would be entitled to under the circumstances of this case.

The Government does not claim that as a sovereign power it is subject to the Idaho Workmen's Compensation laws nor does it claim that as a sovereign it would be a statutory employer under the Idaho act. Whether or not the United States of America is subject to the Workmen's Compensation laws of the State of Idaho is not the issue in this case. The real issue is framed by the wording of the Federal Tort Claims Act, itself. The test of liability of the Government is simply this: Would a private person under the same circumstances of record in this case and under the laws of Idaho be liable? Because the Government is in fact a sovereign power and actually as such is not subject to the Idaho law is not relevant to the issue here. Rather, the question is: What liability would a private person have under these circumstances and under Idaho law.

To resolve this question we must look to the Idaho statutes and decisions to determine whether or not the Government would, *if a private person*, be classed as an “employer” under the Idaho Workmen's Compensation Act. If so, then the fact that appellants

have received compensation benefits under the Act is a bar to their suit against the Government.

What tests have the Idaho courts applied to determine whether or not a person would be classed as an employer under the Idaho Workmen's Compensation Act?

In *In re Fisk*, 40 Idaho 304, 232 P. 569, the Bonner Tie Company contracted with one D to haul ties to the railroad. D employed Danielson to do the hauling. On February 4, 1919, Danielson procured the deceased to drive his team for him, under his (Danielson's) agreement with D. While so doing, Fisk met his death. Was Fisk an employee of the Bonner Tie Company within the meaning of the Workmen's Compensation Act?

The court held that he was and states, on page 308:

"Appellant contends that the rule of independent contractor, as applied in negligence cases is applicable to cases under the Workmen's Compensation Act, and that when the workman is employed by an independent contractor, no recovery can be had against the procurer of the work. Under our statute and the rule in the Vermont case, *supra*, which we approve, the doctrine of independent contractor does not apply to the present case. In *McDowell v. Duer*, 78 Ind. App. 440, 133 N. E. 839, the Supreme Court of Indiana held that the doctrine of 'independent contractor' is peculiar to the law of negligence *and has no proper place in the law of Workmen's compensation. The compensation*

*act makes it clear that every phase of the controversy is withdrawn from the operation of the common law rules. (C.S., Sec. 6214). The intent is that every industrial workman or, his independent heir, is entitled to recover compensation for injury or death occurring in the course of his employment from the industry for which he was working at the time of the accident."*

Again, on page 308, the Court states in the Fisk case:

*"Under our statute the proprietor of a business and his surety may be liable for injury to a workman even though he is employed by and works under the direction of an independent contractor, provided the work being done at the time of the injury is a part of the particular business being carried on by the proprietor. If Derthick had been operating an independent transfer business, then Fisk, or his dependent, would have had to look to Derthick for compensation. But the facts show that Derthick was not carrying on an independent business, but was engaged exclusively in hauling the appellant company's ties and matchstock to the railroad. The work was a part of the company's business necessary to the sale of its products. Danielson was an employee of the company within the meaning of the statute, and Fisk, who took Danielson's place temporarily, stepped into his shoes and had the same status. We conclude that Fisk was an*

employee of the company within the meaning of the statute.”

In *M. E. Larson, et al vs. Independent School District No. 11J of King Hill, Idaho, et al*, 53 Idaho 49, 22 P. 2d. 299, a school janitor’s wife assisted the janitor and was killed while scrubbing floors of the school. It was held that the wife was an employee of the school district, even though she was hired by the janitor to assist him with the school district’s knowledge. The Court held that even though the wife of the janitor did not receive money from the school district for her work, the janitor received a place to live in addition to his \$70.00 a month salary and on page 53, the Court states:

“Compensation may be in other things than money.”

The Court further held in the Larson case that it was not necessary to show that control over the work of the injured or deceased employee be exercised but that if the *right of control* existed that was sufficient.

In *Jones v. Packer John Mines Corp.*, 60 Idaho 653, 95 P. 2d. 572 the Court held that the true test of whether or not a corporation was an employer of an injured miner within the Workmen’s Compensation Act was whether the corporation was *virtually the operator of the business of mining such ore for either development of the property or its own pecuniary gain.*

In the case of *Pinson v. Minidoka Highway District*, 61 Idaho 731, 106 P. 2d. 1020 the deceased was



engaged by the United States Bureau of Reclamation and paid by the United States of America to work to improve a road in the Minidoka Highway District, and was directed by the Reclamation Service to work for the highway district under the direction of the State Highway Engineer. The record showed that neither the United States nor any of its officers or agents had *any control of any character over the deceased while at work, or over the work being done by the Minidoka Highway District*. The deceased was injured while working on the highway and later died of those injuries. The highway district argued that the deceased was an employee of the United States of America and entitled to compensation from the United States. They contended that for this reason he was not entitled to compensation from the highway district, because it was not an employer within the meaning of the Workmen's Compensation law. The Court states on page 737 in holding the highway district liable:

*“The general test is the right to control and direct the activities of the employee, or the power to control the details of the work to be performed and to determine how it shall be done, and whether it shall stop or continue, that gives rise to the relationship of employer and employee, and where the employee comes under the direction and control of the person to whom his services have been furnished, the latter becomes his temporary employer, and liable for compensation.”*

Appellants argue that the Government cannot be statutory employer under the facts of this case and cite the case of *Moon v. Ervin*, 133 P. 2d 933, 64 Idaho 464. The Court held in the Moon case that the owner of property upon which he had let a contract for the construction of a home was held not to be an employer within the meaning of the Workmen's Compensation Act. Appellants correctly quote from the Moon case. However, on page 470 the Court states further:

“. . . as stated above, respondent Schreiber was not an employer. *He had not the power of control of either Ervin or his employees.*”

Appellants argue that the case of *Gifford v. Nottingham*, 193 P. 2d 1054, 68 Idaho 330 is completely in point with the present discussion. In that case Nottingham had contracted with the City of Pocatello to build a sewer. Gifford was killed while working for subcontractors hired by Nottingham. The heirs of Gifford sued for his wrongful death and Nottingham defended on the grounds that he was an “employer” under the Idaho Workmen's Compensation law and that therefore a wrongful death action could not be brought against him. Respondents argued that the City of Pocatello was the actual proprietor and therefore the “employer” under Idaho law. The Court rejected this approach and held that Nottingham was an “employer” under the Idaho law and that an action against him could not be maintained. The case was reversed and dismissed with prejudice.

Appellants contend that the Nottingham decision

is completely in point with the "present discussion." They state that in Nottingham and the case at bar both the City of Pocatello and the Government occupy similar positions in that "in each instance they exercised general supervision and inspection to determine that the work was being done according to the contract." (page 26, appellants' Brief)

In *Nottingham* the respondents argued that the City of Pocatello was the "employer" under the Idaho law and that suit would lie against the contractor Nottingham as a third party tort-feasor. The Court held that this reasoning was in conflict with its decision in *Moon v. Ervin*, supra, where it was held that the owner of the premises was not necessarily the "employer" in that, he *exercised no control* over the contractor or his employees.

We fail to find any statement by the Court in the Nottingham case which would even imply that the City of Pocatello "exercised general supervision and control."

Not only do we fail to find such a holding in *Nottingham*, but if such were the fact then surely the Idaho Court would have given more weight to respondent's argument that the city was the "employer" under the Idaho law, especially in light of the emphasis placed by the Court in the *Moon* case on the *lack of control* exercised by the owner of the premises.

The City of Pocatello was not a party to the suit nor is any mention made in the Nottingham decision of any right of supervision and control over the work of the contractor.

Rather it seems to us that the Nottingham decision is strong argument for holding that the Government is an "employer" in the case at bar as the facts as alleged by appellants in their Complaint set forth the existence of the *power* of control and actual *exercise* of control by the Government over the construction of the dam. The Court in the Nottingham case states on page 336:

"Under the provision of the statute quoted, the true test is, did the work being done pertain to the business, trade, or occupation of the defendant, carried on by it for pecuniary gain? If so, the fact that it was being done through the medium of an independent contractor would not relieve the defendant from liability."

To be classed as a statutory employer under the Idaho Workmen's Compensation Act a party may be the owner or lessee of the premises, or other person who is virtually the proprietor or operator of the business there carried on, but who by reason of his being an independent contractor or for any other reason is not the direct employer of the workman there employed. (Section 72-1010 Idaho Code) If a person owns the premises upon which the business or operation is being carried on but exercises no control and does not have the right or power to control the activities of the employees engaged in the work being done, then that person is not necessarily a statutory employer under the meaning of the Idaho Workman's Compensation Act. (*Moon v. Ervin*, *supra*; *Gifford*

v. *Nottingham*, supra.) As long as the person has the right to control or the power to control the activities of the workmen on the premises it is not necessary to show that he actually exercised control and compensation to the employee does not have to be in actual money. (*M. E. Larson, et al v. Independent School District No. 11J, King Hill, Idaho, et al*, supra) The business being conducted on the premises need not be operated directly for pecuniary gain but may be conducted for the development of the property upon which the business is being conducted. (*Jones v. Packer Johns Mines Corp.*, supra) If a person has the right to control or direct the activities of the employee, or the power to control the details of the work to be performed and to determine how it shall be done, and whether it shall stop or continue, then he may become an employer. (*Pinson v. Minidoka Highway District*, supra)

In *French vs. J. A. Terteling & Sons, Inc.*, 75 Idaho 480, 274 P. 2d 990, a case which is somewhat similar, procedurally, to the case at bar, we have the following situation: Plaintiff sued for damages caused by injuries while working as a jackhammer operator on the Palisades Dam for Jones & Tompkins, contractors. Plaintiff alleged that he was transferred by Jones & Tompkins to work for the defendant corporation. He further alleged that defendant instructed him where to work. The defendant demurred to the complaint and the Court sustained the demurrer and granted a judgment of dismissal against

the complaint, on the grounds that the complaint, itself, alleged an employer-employee relationship between plaintiff and defendant and that, therefore, the Court was without jurisdiction to hear the matter since the question of compensation for an employee's injuries was exclusively a matter within the jurisdiction of the Idaho Industrial Accident Board under the provisions of the Idaho Workmen's Compensation Act.

The plaintiff below then filed a motion to set aside the judgment of dismissal on the ground that he was not afforded the right to amend his complaint. Along with that motion he filed an amended complaint. The motion was overruled by the lower Court.

The Idaho Supreme Court affirmed the decision of the lower Court on all points.

On page 484, the Court states as follows:

“The relationship of employer and employee being established, the rights and remedies of the employee injured in the course of his employment are exclusively provided for by the Workmen's Compensation Law. The common law action against the employer for negligence is abrogated. Jurisdiction over the employer-employee relationship is vested in the Industrial Accident Board. (Citations)”

Concerning the overruling of the motion to set aside the dismissal, the Court states, on page 485:

“However, appellant urges that he was entitled

to amend his complaint once as a matter of course. The demurrer having been argued and submitted to the court and ruling made thereon, the provision of the statute providing for the amendment of a pleading once as a matter of course was no longer applicable. Sec. R 5-904, I.C. Amendment thereafter could only be made by leave of court. Sec. R 5-905, I.C.”

Again, on page 485, the Court states concerning the amended complaint:

“ . . . it is open to the same objections as the original complaint. The only difference appearing is that in addition to the facts alleged in the original complaint, appellant alleges the mere conclusion that at the time of the accident he was an employee of Jones & Tompkins and was not an employee of respondent.”

For other Idaho cases discussing the effect that the right to control has on the employee-employer relationship, see *Laub vs. Meyer, Inc.* 70 Idaho 224, 214 P. 2d 884 and *Ohm vs. J. R. Simplot Co.*, 70 Idaho 318, 216 P. 2d 952.

The complaint in the case at bar flatly states that the Government was engaged in constructing a dam and that the deceased was working for the contractors who were performing the work for the Government. The complaint further states that the dam, the control works, and the land on which the dam was being built were in the possession, control, dominion,

and authority of the Government. It states that Major Graham Emore, USA, was supervising the work and that the Government was engaged through its employees in the detailed supervision of the construction of the dam.

Standing alone the complaint unequivocally sets forth facts sufficient to make the Government a statutory employer under the Idaho Workmen's Compensation Act if the Government were a private person.

In its answer to interrogatories of the plaintiff the Government states in effect that none of its employees had control over the actual construction of the control tower of Lucky Peak Dam in May of 1953; that the work was being performed by contractors having such general management and control; that no employees of the Government were working on the control tower in May of 1953; that Mr. Graham Emore was not acting in a supervisory capacity but that he was engaged in inspecting certain cement operations being conducted by the contractors in May of 1953; and that the premises upon which the dam was being built were owned by the United States of America but that certain areas were allocated to the contractors and that they had control over those areas.

*After* the above answers were given the the appellants and *after* a certified copy of the contract between the Government and the contractors was handed to appellants, they denied that the Government did not have a right to direct, supervise and control



the work of the deceased. In their answer to the Government's interrogatories appellants set forth that an employee of the defendant, one Walter J. Murphy, Project Engineer, was *in charge locally of construction of the project*.

Considering the entire record, the Government, if a private person under the facts and circumstances in this case and under the Workmen's Compensation Act of the State of Idaho and the Idaho decisions interpreting that Act, would be considered an "*employer*." Certainly the Government has the right in this case to raise the defense that the appellants are excluded from recovery because they were paid compensation benefits under the Workmen's Compensation law of the State of Idaho prior to the time of their suit against the Government and that such payment is an exclusive remedy.

### III

CONGRESS MEANT BY ENACTING THE FEDERAL TORT CLAIMS ACT TO MAKE THE LAW OF THE STATE WHERE TORT WAS COMMITTED *IN ALL RESPECTS* A MODEL FOR THE LIABILITIES IT CONSENTED TO ACCEPT FOR THE GOVERNMENT.

Appellants argue that the Government by consenting to be sued under the Federal Tort Claims Act actually intended that the application of the law of the state where the tort was committed should be confined only to whether or not a tort was actually

committed and the extent of recovery allowed. On page 20 of their brief, appellants cite the case of *Capital Transit Company vs. United States*, 183 F. 825 at 829, as authority for their assertion that the application of the local law of the place where the tort is committed should be severely limited.

The *Capital Transit case* was reversed in *United States, vs. Yellow Cab Company*, 340 U. S. 543, 1951, another case cited by appellants.

Actually, in the *Capital Transit case* the question was whether the Government could be joined as a third party defendant in a suit between private litigants when the purpose of such joinder would be to secure contribution from the United States as a joint tort-feasor under the Federal Tort Claims Act. The appellate court in a strict interpretation of the Federal Tort Claims Act held that the Government could not be brought in as a third party defendant under those circumstances and that the United States could only be sued in the manner and according to the procedure to which it had consented. Since the Tort Claims Act did not permit the joinder of the United States either as a co-defendant or as a third party defendant, therefore, the Government would not be allowed by the Court to become a third party defendant in that case.

The United States Supreme Court in the *Yellow Cab case*, supra, held that the Government could be made a third party defendant under the Federal Tort Claims Act and stated, on page 554:

“Once we have concluded that the Federal Tort Claims Act covers an action for contribution due a tort-feasor, we should not, by refinement of construction, limit that consent to cases where the procedure is by separate action and deny it where the same relief is sought in a third-party action. As applied to the State of New York, Judge Cardozo said in language which is apt here: ‘No sensible reason can be imagined why the State, having consented to be sued, should thus paralyze the remedy.’ 243 N. Y. at 147, 153 N. E. at 29. ‘A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizens—When authority is given, it is liberally construed.’ United States vs. Shaw, 309 U.S. 495 at 501.”

Appellants argue that “*the fact workmen’s compensation has been paid, therefore, has no effect upon a claim under the Federal Tort Claims Act, if the local law allows it. And Idaho law does.*” Payment of benefits under the Idaho Workmen’s Compensation Act is not a bar to an action for wrongful death against a third party tort-feasor or one who is not the employer of the injured person under the interpretation of the word “employer” in the Idaho Workmen’s Compensation Act. Idaho law does not allow suit for wrongful death against a person who has been classed

as a statutory employer under the Idaho Workmen's Compensation Act. We submit that the Government would if a private person under the Idaho law be so classed.

*Cerri vs. United States*, 80 Fed. Supp. 831; *Mid-Central Fish Company vs. United States*, 12 Fed. Supp. 792, *Somerset Seafood Company vs. United States*, 193 Fed. 2d 631; *Claypool vs. United States* 98 Fed. Supp. 702, and *Union Trust Company vs. United States*, 113 Fed. Supp. 80, cited by appellants in their brief are all situations wherein the defense had been raised that the Governmental activities giving rise to the injuries being sued for were such that a private person would not be engaged in. The Court in those cases holds that merely because of the peculiar nature of the activity in question, for example, the marking of a battleship, disseminating of weather information, or the regulating of aircraft, it is not sufficient reason to remove the Government from liability for negligence of its employees while acting within the scope of their employment while engaged in such functions. We agree.

In the case of *Rushford vs. United States*, 204 F. 2d, 831, CCA 2, 1953, the Government was sued under the Federal Tort Claims Act by an employee of a contractor in chief to whom the Government by contract had let out a housing project, with the retained right of supervision. The Court below, in its decision, 92 F. Supp. 874, summarily dismissed the complaint and the appeal is taken from that order

of dismissal. It was held that in applying the New York law, that a release of one of several joint tortfeasors without reserving any claim against others releases all, to the fact that the plaintiff-employee gave a release to a subcontractor, whose truck had caused his injuries that his suit was properly dismissed. The Court states, on page 832:

“The ‘Federal Tort Claims Act’ gives jurisdiction to the district courts over actions for injuries caused by an employee of the United States ‘under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred’, . . . On the other hand it is settled law that state (New York State), following the common law, the release of one of several joint tort-feasors, without reserving any claim against the others, releases all. The plaintiff’s answer to this is that although the Act adopts the local law so far as concerns those facts that are necessary to determine whether a claim arises at all, it stops there. Transactions that may release the claim, or, we assume, may affect its continued existence in any other way, are not within the words: ‘under circumstances where—a private person, would be liable’. We need not say whether the effect of a release, executed in another state, is to be determined by the law of that state, or by the law of the state where the claim arises, for the release at bar was executed in New York; and the plaintiff does

not tell us to what law we are to look; whether to some 'general' or 'Federal' law under the doctrine of *Swift v. Tyson*, 16 Pet. 1, 10 L Ed. 865, or elsewhere. Nor need we seek any such umbrageous refuge; *for it is plain that Congress meant to make the proper state law in all respects the model for the liabilities it consented to accept; and that the 'circumstances' included as much those facts that would release a liability once arisen, as those on which its creation depended.* Since the release was executed in New York, it is the law of that state that controls."

Under the reasoning of the liberal construction of the Federal Tort Claims Act as set forth in the *Yellow Cab case* by the Supreme Court of the United States, and especially considering the *Rushford* decision, and the wording in the Tort Claims Act itself, we do not feel that the courts have intended that the Government should be deprived of any of the defenses which would be available to a private person under the law of the state where the tort occurred and under the circumstances of that particular case.

#### IV

NO GENUINE ISSUE AS TO ANY MATERIAL FACT BEING PRESENT, THE GOVERNMENT WAS ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

Rule 56 (b) of the Federal Rules of Civil Procedure provides, in part, as follows:

“A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.”

Rule 56 (c) of the Federal Rules of Civil Procedure provides, in part, as follows :

“The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is *no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . .*”

On a motion for summary judgment made by the defendants facts well pleaded in the complaint must be taken as true. Certainly where no answer has been filed, unless by admissions, depositions, or other evidence, it appears otherwise beyond genuine controversy. *10 Cyc. of Fed. Proc., 3d Ed., 193, Sec. 35.22.* In the case of *Suckow Borax Mines Consolidated, Inc., et al. vs. Borax Consolidated, Ltd., et al*, CCA 9, 1950, 185 F. 2d 196 Cert. Den. 340 U.S. 943, wherein the plaintiff brought an action for treble damages for violation of the Sherman and Clayton Acts, and the Court entered an order dismissing plaintiff's complaint, the Court upheld the lower Court on the grounds that the plaintiff's cause of action was barred by the California three-year statute of limitations. One of the procedural questions

involved in this case was the question of what effect the filing of a motion of dismissal, or in the alternative, a motion for summary judgment, has on pleadings then on file. On page 205, the Court states:

“Appellants’ next contention is that appellees, by filing their motions, admitted all of the well pleaded allegations of fact in the complaint, and that the affidavits filed by appellees in support of the motion cannot be used to contradict such allegations in the complaint. Generally speaking, this is a correct statement of the law. Rule 56 was not designed to permit a trial of real and genuinely contested issues of fact by affidavit. (citation) But when a general statement in a pleading is shown by specific facts stated in controverting affidavits, depositions and admissions, to be untrue, and the facts so presented are not denied and are not of such nature as to be peculiarly within the knowledge of the affiant, then no ‘genuine’ issue remains for the trier of the facts. (citations).”

In *Burnham Chemical Company vs. Borax Consolidated Company* (CCA 9) 1948, 170 F. 2d 569, the Court states, on page 574:

“The court was fully persuaded that if the evidence then before it was taken as true, and *all reasonable inferences favorable to appellant were drawn therefrom*, this evidence would still lead a reasonable man impartially exercising his judgment, to conclude that it revealed an entire absence



of any genuine issue in the case as to any material fact . . .”

In *Harris vs. Railway Express Agency, Inc.*, 178 F. 2d 8, CCA 10, 1949, an action by the plaintiff against the Railway Express Agency for personal injuries, a summary judgment for the defendant was entered and that judgment was affirmed on appeal. On page 9, the Court states :

“On a motion for summary judgment, *all facts in the complaint well pleaded stand admitted*. On a consideration of such a motion, the court not only considers the allegations of the complaint but also all facts shown by depositions and affidavits, concerning which there can be no dispute.”

In the case of *Creedon vs. Bowman*, 75 F. Supp. 265, DC WD (Penn.) 1948, the Court states, on page 267:

“Since no answer has been filed, the motion filed by the defendant could be considered either as a motion for summary judgment or to dismiss the complaint. *In either instance all facts well pleaded in the complaint must be presumed to be true.*”

On a motion for summary judgment then the Court must look to all of the pleadings, interrogatories, admissions, depositions, or affidavits on file in the case at the time the motion is made. The allegations of the complaint for purposes of determining the motion for summary judgment must be taken as true and

considered in the light of the other pleadings on file.

In applying these rules to the consideration of the motion for summary judgment made by the Government, the court correctly granted that motion for the following reason:

The complaint, interrogatories and admissions make it clear that appellants claim that the Government, through its employees working on the Lucky Peak Dam, *controlled, supervised, and exercised dominion over the actual construction of the dam and over the premises upon which the dam was being built*. A private person, under the circumstances set forth in the pleadings in this case and under the Workmen's Compensation Act of the State of Idaho, would be classified as an "employer" and that, therefore, appellants' suit for wrongful death of the deceased is barred under the exclusive provisions of the Idaho Workmen's Compensation Act.

## V

THE APPELLANTS WERE NOT ENTITLED TO AMEND THEIR COMPLAINT AS A MATTER OF RIGHT AND THE COURT'S REFUSAL TO GRANT SUCH AN AMENDMENT AS A MATTER OF LAW WAS WITHIN ITS SOUND DISCRETION.

In the case of *United States, Ex Rel. Brensilber, et al, vs. Bausch and Lomb Optical Company, et al*, 131 F. 2d 545 (CCA 2nd) 1942, the United States sued to recover penalties under 31 USCA, Section

231. A motion for summary judgment dismissing the action was granted and the plaintiffs appealed. On page 547, the Court states:

“In the view we take, it is not necessary to decide whether the plaintiffs had the unconditional right under Rule 15 (a), Federal Rules of Civil Procedure, 28 USCA, following Section 723 (c), to serve the amended complaint. The judge did indeed deny leave to amend on the ground that the second complaint did not state a cause of action, as to which he was perhaps wrong, taking the pleading as it reads. *But in result it made no difference, for the amended complaint like the original was subject to summary dismissal, and it was mere matter of form whether it was accepted and then dismissed, or refused at the outset . . .* The action is of precisely the sort which a motion for summary judgment was intended to nip in the bud.”

Rule 15 (a) of the Federal Rules of Civil Procedure provides, in part, as follows:

“A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty days after it is served. Otherwise, a party may amend his pleading only by leave of court or by a written

consent of the adverse party; and leave shall be freely given when justice so requires . . .”

As to whether or not a motion for summary judgment is considered a responsive pleading, the decisions are in conflict. The court held that such a motion was a responsive pleading in the case of *Triangle Conduit and Cable Company, Inc. vs. National Electric Products Corp.*, (DC Delaware) 1941, 38 F. Supp. 533. This case was reversed on other grounds in 125 F. 2d 1008. In *Park-in Theaters vs. Paramount-Richard Theaters* (DC Delaware) 1949, 9 FRD 267 citing *Rogers vs. Girard Trust Co.*, CCA 6, 1947, 159 F. 2d, 239, the court held that a motion for summary judgment was not a responsive pleading. We favor the latter decisions.

That question is not at issue in this case, however. Before the motion to amend the complaint was made in the case at bar, the Court had *entered a memorandum decision granting the Government's motion for summary judgment*. The motion for summary judgment had been made by the Government on July 12, 1954, and the Court, after hearing oral argument and after receiving extensive briefs from both sides, handed down its memorandum decision granting that motion on September 20, 1954. Appellants did not move to amend their complaint until after the Court's decision was made.

In the case of *Rucienski vs. Vanadium Corporation of America*, 6 F. R. D. 313, DC WD (N.Y.)

1943, which was a suit for damages for injuries caused by a disease attributed to the inhalation of harmful impurities in the air, plaintiff's motion to file an amended complaint was granted after a motion for summary judgment was filed. Here the motion was argued before the Court and taken under advisement by the Court with the understanding that the motion would be held subject to being brought on for further consideration upon notice by either party. Neither party had made any move to bring the motion up for further consideration, and *no decision by the court on the motion had been made*. The plaintiff then moved for leave to serve an amended complaint and the defendant opposed the motion on the ground that it was not timely. On page 313, the court states:

“The defendant opposes the motion on the ground that it is not timely. I think there is no merit to that contention. *There has been no decision on the Motion of Summary Judgment and the parties are in much the same position as if that motion had never been made.*”

Appellants possibly recognized the fact that they did not have, as a matter of right, the right to amend the complaint without leave of the Court in this case, because leave to amend was requested on September 21, 1954, after the memorandum decision of the Court granting a motion for summary judgment was entered and counsel for appellants, in his affi-

davit, recognized the fact that the memorandum decision of the Court granting the motion for summary judgment had been entered.

It has been held in the case of *In Re Watauga Steam Laundry*, DC ED Tennessee, 1947, 7 F.R.D. 657, that Rule 15 (a) was designed for the benefit of the party, and that it was a well recognized procedural principal that a party may waive rights preserved peculiarly to him. The court held that the right to amend his pleading once without leave by applying for leave to amend and causing a hearing on that application was waived.

It was within the sound discretion of the trial court to either refuse or grant the motion for leave to amend the complaint. See *Royal Indemnity Company vs. Olmstead*, 193 F. 2d 451, CCA 9, 1951.

The court below, in denying appellants' motion for leave to amend the complaint, states as follows:

"On consideration of the pleadings, admissions, interrogatories and briefs on file herein, it does not appear that it would serve any useful purpose to grant plaintiff's motion nor does it appear that granting such leave would be in the interests of justice. Also, the Court is not inclined to exercise its discretionary power to grant such leave since, by amending, plaintiffs seek to shift their ground, denying facts, which they earlier alleged and admitted, on which summary judgment was granted. Plaintiffs now seek to proceed upon a theory which

conflicts with that which they pursued up to the granting of said summary judgment.” (Tr. 59)

Plaintiffs, in their attempt to amend the complaint, are, in effect, attempting to reduce their allegations that the Government controlled the construction work on the dam to the point where the Government would not have enough control over the activities of that work to constitute it an employer under the Idaho Workmen’s Compensation Act, and yet, on the other hand, they want to allege sufficient control so that the Government would be liable under the facts of their claim.

However, in their amendments to the complaint (Tr. 70) the appellants allege:

“That the work upon the Lucky Peak Dam project being performed by the independent contractor, was done under said Contract No. DA-45-164 -eng-2200, and that the work thereunder *was being conducted under the general direction of the contracting officer thereon and subject to the inspection of his appointed agents, all of whom were employees of defendant. That such general supervision and inspection as set forth in said contract was for the purpose of determining compliance by the independent contractor by such contract.*”

We submit that the above allegations in the proposed amendments of supervision and control on the part of the Government under the terms of the con-

tract would classify the Government as an employer under the Idaho Workmen's Compensation Act if the Government were a private person, and that if the Court had granted appellants' leave to amend the complaint in the manner requested that the amended complaint would have been subject to a further summary judgment in favor of the Government as a matter of law.

When the defect in a complaint is basic and appears incapable of being cured, it would be a waste of time to permit a plaintiff to have a chance to correct a faulty pleading. See *Boro Hall Corp. vs. General Motors Corp.*, (DC SD NY), 37 F. Supp. 999, affirmed 124 F. 2d 822; *Louisiana Farmers Protective Union vs. Great Atlantic and Pacific Tea Co.* (DC ED Ark.) 40 F. Supp. 897. Also see *Package Closure Corp. vs. Sealright Co.*, 4 F.R.D. 114 (DC SD NY) 1943.

In the case of *Hale vs. Morgan Packing Co.*, 91 F. Supp. 11 (USDC ED Ill.) 1950, the Court held that, on page 13:

"Of course, plaintiff could be permitted to amend his complaint and make the new party defendant, but the Court should not permit an amended pleading to cure defects therein where the amendment would be futile. *U. S. vs. Crary*, DC, 1 F. Supp. 406; *Hartmann vs. Time, Inc.*, DC 64 F. Supp. 671, at page 681."

In the case of *Bell vs. Morgan, et al*, 199 F. 2d 168



(CCA DC) 1952, an action wherein plaintiff sued on alleged agreements in writing for the sale of land in the District of Columbia, the lower court awarded summary judgment to the defendants and plaintiff appealed. It was held that the refusal of Court after judgment was entered to permit plaintiff to file an amendment to his complaint alleging instead of an agreement in writing an oral agreement evidenced by a memorandum in writing was <sup>not</sup> an error.

### CONCLUSION

In view of the arguments advanced in this brief and in light of the lower court's memorandum decision on the same questions the judgment below should be affirmed.

We should like to present to the Court very briefly in this conclusion a further equitable argument in favor of the judgment below.

The purpose of the passage by Congress of the Federal Tort Claims Act was to equalize the remedies of persons who should happen to be damaged because of the wrongful acts of governmental employees acting in the scope of their employment. The passage of the Act was to relieve some of the burden placed upon Congress caused by bills for relief of private persons so damaged who had no other remedy or recourse, because the United States of America could not be sued without its consent.

The tort claims act was passed to permit suit

against the Government under certain conditions "if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

The reason for this provision was to equalize the remedies available to the citizens of the same state. Because prior to the passage of the act a person injured by the negligent acts of an employee of the Government had no remedy for his damages at law. But a person injured by similar acts of negligence of an employee of a private company could sue the employer and collect damages.

Appellants contend that not only should they receive compensation under the Idaho Workmen's Compensation Act from the contractor but that they should also collect damages in addition from the Government. According to their reasoning not only has the Tort Claims Act equalized the remedy to the citizens of Idaho, but it doubles the remedy if the negligent person happens to be an employee of the United States of America.

Appellants admit they have recovered under the Idaho Workmen's Compensation law. They claim the right to further recovery against the Government. We submit that if a private person were the defendant appellants could not maintain this action and if it were allowed against the Government, the only reason would be that the defendant happens to be the United States of America.

If appellants were allowed to recover in this case and if this type of action were permitted against the Government, a situation would exist which would be just as inequitable as it was before passage of the Tort Claims Act. Because an injured person in one instance could recover compensation from his employer and be excluded from any other remedy under the Idaho Workmen's Compensation Act; but another person injured under identical circumstances could recover compensation under the Idaho law and, in addition, could recover judgment against the Government.

We submit that the type of situation presented in the case at bar was one which the Federal Tort Claims Act intended to prevent by the provision allowing recovery only "if a private person would be liable to the claimant in accordance with the laws of the place where the act or omission occurred."

Respectfully submitted,

SHERMAN F. FUREY, JR.

*United States Attorney for the  
District of Idaho*

By \_\_\_\_\_

JOHN T. HAWLEY

*Assistant United States Attorney  
for the District of Idaho.*



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In the United States  
**Circuit Court of Appeals**  
For the Ninth Circuit

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MARTHA M. KIRK, an adult, and  
KENNETH WILLIAM KIRK, a minor, who sues by his  
Guardian ad Litem, Martha M. Kirk,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

---

**APPELLEE'S PETITION FOR REHEARING  
AND  
BRIEF IN SUPPORT OF PETITION  
FOR REHEARING**

---

SHERMAN F. FUREY, JR.  
United States Attorney  
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District of Idaho  
Attorneys for Appellee.

**FILED**

Filed....., 1956  
MAY 21 1956

....., Clerk  
PAUL P. O'BRIEN, CLERK

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In the United States  
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MARTHA M. KIRK, an adult, and  
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**APPELLEE'S PETITION FOR REHEARING  
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## PETITION FOR REHEARING

TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE NINTH CIRCUIT AND  
THE JUDGES THEREOF:

COMES NOW the United States of America, the appellee in the above entitled cause, and respectfully petitions for a rehearing in the above entitled cause for the following reasons and upon the following grounds:

### I

The court erred in ruling that the United States of America was not an "employer" in this case and giving as its reasons the fact that there is no specific provision in the Idaho Workmen's Compensation Act which would define the Government as such. Such ruling is erroneous for the reason that the legislature of the State of Idaho cannot limit or expand the liability of the United States of America under the Federal Tort Claims Act. The Government, as a result thereof, is deprived of the right to have its liability limited to the specific wording of the Federal Tort Claims Act wherein it provides that the liability of the United States shall be that of a private person under like circumstances under the law of the place where the tort occurred.

### II

The court erred in holding that the Idaho Workmen's Compensation Act does not furnish a defense to the Government in this action and giving as its reason the fact that the Idaho Code has been continued without change under a 1949 Code Compila-

tion since the enactment of the Federal Tort Claims Act and that no amendments were provided therein defining the United States as an "employer." The court erred because such a ruling deprives the Government of the limitations on its liability set up in the Federal Tort Claims Act, itself, wherein the standard of liability is the liability of a private person under like circumstances and under the law of the state where the tort occurred.

### III

The court erred in holding that the Idaho statute should not be extended by construction to abrogate what would otherwise be a plain cause of action against the United States since 'the statute did not expressly so provide or necessarily so imply.' Such a ruling is error for the reason that the standards of liability of the United States of America as set out in the Tort Claims Act cannot be changed, expanded or limited by the Idaho legislature.

### IV

The court erred in holding that under the provisions of the Idaho Workmen's Compensation Act and the Idaho Supreme Court decisions interpreting that act, that the Government, if a private party, would not be an employer under the terms of the act for the reasons set forth in our original brief, pages 9 through 18, and for the further reasons that follow these assignments in our brief and argument.

### V

The court erred in holding that the trial court's decision denying appellants' right to amend was

“wholly unwarranted and a ruling operating to avoid ascertaining the true facts in the case” for the reason that all of the “true facts” were in the possession of appellants eighty-three days before the court’s opinion granting summary judgment was handed down, and for the further reasons that appellants chose to stand upon their pleadings despite the fact that they had all of the information giving rise to their attempted amendments long before the lower court’s decision was entered.

## VI

The court erred in holding that the case should be sent back for a trial in the face of its ruling that the dam was being built by an independent contractor, for the reason that the general rule is that the employer shall not be liable for the torts of an independent contractor or the latter’s servants, and in this case the amended complaint merely alleges acts of omission only as constituting the negligence on the part of the United States of America.

The foregoing assignments will be further exemplified in our brief and argument following.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted, and the judgment of the District Court of the United States for the District of Idaho, South-

ern Division, be, upon further consideration, affirmed.

Respectfully submitted,  
SHERMAN F. FUREY, JR.,  
*United States Attorney  
for the District of Idaho*

By  
JOHN T. HAWLEY,  
*Assistant U. S. Attorney  
for the District of Idaho.*

### CERTIFICATE OF COUNSEL

I, John T. Hawley, counsel for the above-named appellee, do hereby certify that the foregoing petition for rehearing of this cause is well founded and presented in good faith and is not interposed for delay.

SHERMAN F. FUREY, JR.  
*United States Attorney  
for the District of Idaho*

By  
JOHN T. HAWLEY,  
*Assistant U. S. Attorney  
for the District of Idaho*

### IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MARTHA M. KIRK, an adult, and KENNETH  
WILLIAM KIRK, a minor who sues by his  
Guardian ad Litem, Martha M. Kirk,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

## BRIEF IN SUPPORT OF PETITION FOR REHEARING

---

In discussing the grounds for our petition for rehearing we will present them in the same order that they are listed in the petition and with corresponding numbers:

### I, II and III.

The court on page 6 of the opinion states:

“Perhaps the most conclusive reason why the United States is not actually an ‘employer’ within the meaning of the Idaho act, is that there is no provision therein which would define it as such.”

Idaho Code, Section 72-103 is then referred to, which lists the public employment to which the act applies and which does not include the United States of America. The Government, of course, never contended that it was actually an employer under the terms of the Idaho Workmen’s Compensation Act. (See our original brief, page 11). Title 28 USCA, Section 2674, provides in part as follows:

“The United States shall be liable respecting the provisions of this Title relating to tort claims *in the same manner and to the same extent as a private individual under like circumstances,—*”

Title 28 USCA, Section 1346 (b) provides in part as follows:

“—the District Court — shall have exclusive jurisdiction of civil actions on claims against the United States for money damages—for in-

jury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment *under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*"

This holding suggests that because the United States of America as such is not specifically included in the Idaho Workmen's Compensation Act, therefore, the Government is not entitled to any defenses arising under that Act. That reasoning in effect places the Idaho legislature in a position to nullify the provisions of the Federal Tort Claims Act itself wherein the liability of the United States of America is limited to that of a private person under like circumstances and under the law of the State where the tort occurred. We seriously contend that the fact that the State of Idaho has not included the United States of America as such in its Workmen's Compensation Act should have no bearing on the specific limitations of liability set forth in the Tort Claims Act itself. We do not feel that the various states should or would even consider legislating directly to affect the liability of the United States for suits in tort. Such legislation is a matter entirely within the control of the Congress of the United States of America. The United States of America is a sovereign, and as such it must give consent before it can be sued. It has given consent to be sued under the limitations and provisions of the Federal Tort Claims Act. To say, in effect, that be-



cause the United States of America is not specifically covered in the Idaho Workmen's Compensation Act, therefore the United States of America shall be denied the defenses arising under that act, is conceding to the State of Idaho a power over the United States which we doubt it possesses. The court states in its opinion on page 9:

"What adds to our confidence that nothing contained in the Idaho Workmen's Compensation Act furnishes any defense in this case, is the fact that the act has been continued without change in an authorized code compilation since the enactment of the Tort Claims Act. <sup>9/</sup> It seems improbable that the Idaho legislature could have intended that the Idaho Act should extend immunity to the United States in cases of this character. Paraphrasing the language used by the Idaho Court in *Brown v. Arrington*, *supra*, we think that the Idaho statute should not be extended by construction to abrogate what would otherwise be a plain cause of action against the United States since 'the statute does not expressly so provide or necessarily so imply'."

The court holds that because the Idaho Workmen's Compensation Act has not been changed since the enactment of the Tort Claims Act is sound reason to believe that the Idaho legislature never intended to extend immunity to the United States in cases of this character. We feel such a holding is erroneous in that it once again concedes a power to the State of Idaho which we are sure it does not now and never

has had. The reasoning the Idaho Court uses in refusing to extend the Idaho Workmen's Compensation Act by construction to abrogate a common law cause of action against a third party seems hardly applicable to the situation in this case. The "plain cause of action" existing against the United States of America exists because the United States of America has consented to be sued. It is not based upon a common law right as was the cause of action in *Brown v. Arrington*, 74 Idaho 338, 262 P. 2d 789. We are not quite clear as to how the court feels the application of the clear wording of the Federal Tort Claims Act limiting the liability of the United States of America could be construed to mean the Idaho Workmen's Compensation Act would be extended by construction to abrogate what would otherwise be a plain cause of action against the United States. We do not contend that the Idaho statute should be extended by construction. However, under the Tort Claims Act the United States is entitled to have its liability measured by the clear wording of the act itself. That is, what would the liability be of a private person under like circumstances and under the law of the place where the tort occurred. The tort occurred in Idaho. Therefore, Idaho law should govern. Since Idaho law governs, then we must look to the liability of a private person under these circumstances under Idaho law. We feel certain that it was never seriously considered by the Idaho legislature to include the United States of America in its Workmen's Compensation Act. To hold that the rights and liabilities of the United States of America can be controlled by the action or inaction of the Idaho State legislature seems to us

to be a serious restriction upon the right of the government to have its liability measured by the clear language of the Federal Tort Claims Act. Congress intended that the United States of America could be sued in tort under certain conditions. Those conditions were spelled out in the Federal Tort Claims Act and consent therefore was given for the Government to be sued pursuant to the provisions of that act, not pursuant to the enactments of the legislature of the State of Idaho.

We realize, of course, that the court in its opinion has also applied the yard stick of the liability of a private person under like circumstances and under the law of the State of Idaho and has concluded that under the record in this case the United States of America would not be classified as an employer if it were a private person under Idaho law. However, the fact that the court so seriously considers the holdings specified in Assignments Nos. I, II and III, and since those holdings will undoubtedly have a tremendous effect upon future standards to be used in determining the tort liability of the United States, we feel they should be brought to the attention of the court. We feel that these holdings are erroneous and will produce an effect never contemplated by the Congress of the United States when it originally passed the Federal Tort Claims Act.

#### IV.

It was the Government's contention that under the facts and circumstances in this case the Government if a private individual would be classed as a statu-

tory employer under the Idaho Workmen's Compensation Act and under the Idaho decisions interpreting that act. The Court finds that the United States could not be said, within the meaning of Idaho Code, Section 72-1010 to be "virtually the proprietor or operator of a business there carried on" and that the Government was not carrying on a business in building the dam. The court holds that it is clear that the United States in this case is occupying a position analogous to that of the physician in *Moon v. Ervin*, 64 Idaho 464; 133 P.2d 933, and to that of the City in *Gifford v. Nottingham*, 68 Idaho 330; 193 P.2d 1054, and the court further cites the case of *McGee v. Koontz*, 70 Idaho 507, 223 P.2d 686.

This contention was made by appellants on page 26 of their Brief wherein they state that the City of Pocatello and the Government occupy similar positions in that "in each instance they exercise general supervision and inspection to determine that the work was being done according to the contract." As we pointed out on page 17 of our original brief, the *Nottingham* case did not say nor did it even imply that the City of Pocatello "exercised general supervision and inspection to determine that the work was being done according to the contract." As a matter of fact, the City of Pocatello was not even a party to the suit. After noting the court's reliance upon the case of *Moon v. Ervin*, (*supra*), in support of its holding that the Government was not the proprietor or operator of some business being carried on on the premises, we once again examined the *Moon* case. In addition to the statement of the Idaho court on page 469 which reads as follows:

—“If it is sought to hold one as an employer in a situation of this kind, it must be shown that such person was the proprietor or operator of the business there carried on. (Citations)”

The court says on page 469 and 470:

“This section makes an employer who is subject to the provisions of the act, liable for compensation to an employee of a contractor or subcontractor under him, etc. As stated above, respondent Schreiber was not an employer. He had not the power of control of either Ervin or his employees.”

From this statement and the other Idaho decisions we concluded in our original brief that the question of control was seriously considered by the Idaho court in determining the employer-employee relationship. However, on page 468 of the Moon opinion, the court states as follows:

“Appellant Moon was employed by Ervin, with others, as a laborer on the construction job, and there is no evidence that he, or the other laborers, received instructions or directions from anyone other than from Ervin, or that any of the respondents in this case had *the right of control over Moon. He was under the sole control of Ervin. The essential element of the relationship of employer and employee is the right of control* (35 Am. Jur., Page 445, Sec. 3).”

In the case of *Laub v. Meyer, Inc.*, 70 Idaho 224, cited in our original brief, page 21, the court held

that the respondent was an independent contractor of Meyer, Inc. and that no contractual agreement existed between him and the appellant Montgomery Ward Co. The court states on page 227:

“The general rule for determining whether one is a general contractor or employee was well stated by this court in *Pinson v. Minidoka Highway District*, 61 Idaho 731, at page 737, 106 P.2d 1020, 1022: ‘The general test is the *right to control and direct the activities of the employee, or the power to control the details of the work to be performed and to determine how it shall be done and whether it shall stop or continue*, that gives rise to the relationship of employer and employee, and where the employee comes under the direction and control of the person to whom his services have been furnished, the latter becomes his temporary employer, and liable for compensation’.”

This court cites the Idaho case of *McGee v. Koontz*, 70 Idaho 507, 223 P. 2d, 686, and we note on page 510 of that opinion that the Idaho court emphasizes control as a key to the determination of the employer-employee relationship.

The Idaho Court then, in determining the employer-employee relationship for the purposes of drawing that relationship into the Workmen’s Compensation Act, gives serious consideration to the right of control existing in each case.

The retention by the employer of the *right and the power* to exercise control or supervision, even though

not actually exercised, is the main test of the relation of the employer and employee. See *In re Black*, 58 Idaho, 803, 80 P.2d 24 and *O'Neil v. Madison Lumber and Mill Company*, 61 Idaho 546, 105 P. 2d 194.

This court takes note of the fact that the complaint contains allegation of control, dominion, authority and supervision over the work of the deceased. We should like to direct the court's attention to the fact that on pages 3, 4, 5 and 6 of our original brief we not only set out in detail what we consider to be the pertinent portions of the complaint, but also set out the pertinent portions of *all of the other pleadings*. It is true that the Government denied that any officer or employee of the defendant had general management or control over the actual construction of the control tower of Lucky Peak Dam in May, 1953. However, on July 8, 1954, the appellants answered the Government's Interrogatories and Request for Admissions, and in so doing they *denied* that the Government did not have the right to direct, supervise, or control the work of deceased. In other words, at that time the appellants were once again asserting that the right of control of the Government over the activities of the deceased existed, even though they knew the Government denied such an allegation. These answers and admissions reasserting the right to control were filed by appellants eight days *after* they had received the information requested by them from the Government. Therefore, the appellants had the information that the Government was denying that the right to control existed, yet having that information, they insisted in their answers that the right to control did exist. In addition to the Government's Response to Admissions and Answer to the

Interrogatories, we point out that on June 3, 1954, the attorney for the appellants was given a copy of the contract between the Government and the Independent Contractor building Lucky Peak Dam. Once again we point out, this information was given to the appellants *before* they answered the Government's Interrogatories and Request for Admissions. When, therefore, appellants once again maintained that the Government had the right to control the activities of the deceased, they did so with full information concerning all of the facts in this case.

All of this information was given to appellants some two months and 21 days before the Motion for Summary Judgment was granted.

What more information could be given to appellants to apprise them of all of the facts in this case including the Government's position?

On July 12, 1954, the Government moved for a summary judgment based upon the pleadings, admissions, interrogatories and a certified copy of the contract filed in the case. The motion for summary judgment was thoroughly briefed and argued before the court, and the court's opinion was not handed down until September 20, 1954.

The appellants then, despite the fact that they had all of the information concerning the true facts, including the contract and the knowledge that the Government denied that the right to control existed over the activities of the deceased, insisted on maintaining their stand upon their complaint. Never at any time until the day *after* the memorandum



decision of the court was handed down, did they indicate that their statement of the facts and their theory of the case would be changed.

There was no attempt by the Government to hide the facts in this case. Certainly the appellants were well aware of our position. Certainly, they were aware of the contractual relationship existing between the Government and the Bruce Mitchell Construction Company. Yet, they stood on their position as alleged in the complaint. They stood on their allegations that the Government was in control and supervision of the activities of deceased, not because of ignorance of the true facts, but because without an allegation that the Government controlled the activities of deceased it would be extremely difficult to find liability against the United States existing for his death. That, we are sure, is the real reason why appellants did not even attempt to amend their complaint until *after* the court ruled.

Two examples of activities presenting "like circumstances" are given by the court. Both of these, the farmer building a dam and the church operating without gain, happen to fall within the exceptions to the Idaho Workmen's Compensation Act and are exempt from its provisions. The farmer, because he is engaged in agricultural activities, the church because it is operating not for the sake of pecuniary gain. We think such analogies are not accurate. The Government is not engaged in agricultural activities. It was building a dam to provide protection for its citizens and their property. The example of

the church illustrates the court's emphasis on the fact that the Government is not out to make a profit. The Government, we repeat, was building a dam, and in so doing, indirectly, and in some instances directly, benefiting its citizens. The Government will receive a profit from this activity. The Government of the United States of America is composed of its citizens, and many of them will profit from the Lucky Peak project. Furthermore, we feel confident that direct benefits measurable in dollars and cents will be received from this project.

If the United States were a land development company, the benefit from this project would be the development of the land, itself. Idaho law does not require that the "business" engaged in shall result in pecuniary gain. The Idaho Supreme Court, as pointed out in our original brief, pp 12-21, has said that development of property alone may be a proper test of the employer-employee relationship under the Idaho Act. (*Jones v. Packer John Mines Corp.*, 60 Idaho 653, 95 P.2d 572. That court has held that benefit need not be actual money. (*M. E. Larson, et al v. Ind. School District No. 11J, King Hill, Idaho, et al*, 53 Idaho 49, 22 P.2d 299). And of course the essential element to consider in determining that relationship is whether or not the right of control exists.

It is hardly within the spirit of the Tort Claims Act to search for "analogous liability" and find it in two activities, agricultural and religious, which are exempt from the provisions of the Idaho Act. We think the court need not have sought such liability in

view of our position wherein we specifically agreed that merely because the United States was engaged in a peculiar activity such fact would not be claimed as a defense in this case.

We strongly urge that the court's opinion is a serious threat to the clearly worded limitation of the liability of the United States defined in the Federal Tort Claims Act. Surely, Congress must have recognized that the United States occupied a unique position in the field of torts when it consented that the Government be sued. Congress must have felt it necessary to include a plainly worded standard of liability based upon the liability of a private person under like circumstances.

We sincerely feel that the court's opinion in this case is a drastic step towards ultimate destruction of this requisite of liability imposed upon all who would sue the Government in tort under the Tort Claims Act.

The opinion actually removes the Government's right to be compared to a private person under like circumstances under the Idaho Workmen's Compensation Act. It removes a segment of Idaho law from application in this case. It seems to us that such reasoning is contrary to that of Judge Learned Hand in *Rushford v. United States*, 204 F.2d 831, wherein he states that the proper state law in all respects was to be the model for the liabilities Congress intended to accept.

## V

On page 11 of the opinion, the court holds that the decision of the lower court in refusing to allow the amendment of the complaint was "wholly unwarranted and a ruling operating to avoid ascertaining the true facts of the case." On page 8 of the opinion it is stated:

"Hereafter, we shall allude to the plaintiffs' attempt to amend their complaint so as to make it conform to the facts as defendant asserted them to be."

Such a ruling indicates without question that the lower court abused its discretion by holding the plaintiffs to their original complaint after the Government admitted that the facts were otherwise. We respectfully point out to this court that while it is true that the Government in its answers to interrogatories and in its admissions denied having the right to control the activities of the deceased, that information was given to the appellants eighty-one days before the summary judgment was entered by the court. This information and the certified copy of the contract was given to the appellants long before briefs were submitted to the court on the motion for summary judgment.

Why did the appellants wait until after the memorandum decision of the court had been handed down granting the summary judgment to the Government before they filed their motion for leave to amend the complaint? They were apprised of all of the facts

so they could have amended their complaint before the motion for summary judgment was even filed. They did not choose to do so. They chose to stand on the allegations of their original complaint, and it was so argued and briefed before the lower court.

We should point out to the court the reasons given by that court in denying the motion for leave to amend which motion was briefed and argued thoroughly before the court. The court stated in its opinion dated March 3, 1955 (R. 59) :

“On consideration of the pleadings, admissions, interrogatories and briefs on file herein, it does not appear that it would serve any useful purpose to grant plaintiffs’ motion, nor does it appear that granting such leave would be in the interests of justice. Also, the court is not inclined to exercise its discretionary power to grant such leave since, by amending, plaintiffs seek to shift their ground, denying facts, which they earlier alleged and admitted, upon which summary judgment was granted. Plaintiffs now seek to proceed upon a theory which conflicts with that which they pursued up to the granting of said summary judgment. *Bell v. Morgan, et al.*, 199 F.2d 168 (1952).”

Now what was it that the appellants attempted to do by amending their complaint — and once again we must emphatically point out to the court that all of the information and facts upon which the amended complaint is based was given to, and was in the possession of, the appellants long before the motion for

summary judgment was ever argued. They reduced the allegations of control on the part of the Government over the activities of the deceased. It is true, as this court points out, that the amended complaint deleted the allegations of control, dominion and authority, but this court goes further and states:

“As was also the allegation that the Government employee was ‘supervising the work.’ ”

We must point out to the court that all of the allegations of supervision were *not* deleted by the appellants. We direct the court’s attention to the proposed amendments to the complaint which read as follows: (R. 70) :

“That the work upon the Lucky Peak Dam project, being performed by the independent contractor was done under said contract No. DA-45-164-eg-2200, and that *the work thereunder was being conducted under the general direction of the contracting officer thereon, and subject to the inspection of his appointed agents, all of whom were employees of the defendant. That such general supervision and inspection, as set forth in said contract, was for the purpose of determining compliance by the independent contractor by such contract.*”

Appellants flatly contend, therefore, in their amendments to the complaint, that the Government employees had general supervision and inspection rights as spelled out in the contract for the purpose of determining whether or not the independent contractor was complying with the contract. For this

court to hold that the lower court abused its discretion in a "wholly unwarranted" ruling which operated to avoid ascertaining the true facts in the case is erroneous and a serious reflection upon the court below. Furthermore, we feel such ruling is not justified considering the entire record before this court.

Once again we call the court's attention to the fact that the "true facts" of this case were before the appellants and their attorney before the motion for summary judgment was even argued and briefed. All of the information upon which the appellants base their proposed amendments to the complaint was in their possession in the latter part of June 1954. Yet they chose to make a stand on the allegations in their complaint. We can only conclude that this stand was intentional and with the full knowledge of the contents of the documents and pleadings given them. Certainly the Government was not hiding or concealing any facts from appellants at any time during the proceedings in this case. We know that the lower court in refusing to allow the amendment had no intention to, and actually did not, make a ruling which would operate to avoid ascertaining the true facts. We know this because the true facts were in the hands of the appellants in sufficient time for them to make their decision to amend the complaint before the motion for summary judgment was even filed.

An examination of the affidavits supporting the motion for the amendment of the complaint made by T. H. Eberle, attorney for appellants in the above case, which affidavit was sworn to on September 21, 1954, and filed with the motion for leave to amend

the complaint, along with the amendments. The affidavit reads in part as follows:

“That the complaint filed in the above-entitled cause was prepared without access to the files and records of the Government, and in particular, the contract between the Government and the construction company,—and further interrogatories and admissions filed and answered by the defendant and plaintiff in this cause, set forth facts unknown to plaintiff at the time this action was filed.”

Appellants filed the action against the Government on February 23, 1954. Possibly they were not in possession of all of the facts as set forth in the affidavit at the time the complaint was filed. However, by the 30th day of June, 1954, they were in possession of all of the facts as disclosed by the appellee's answers to admissions and response to interrogatories and as disclosed by the certified copy of the contract itself.

The appellants have come into court on their complaint and having been apprised of all of the facts which ultimately gave rise to their attempted amendment of the complaint, they made their decision to stand on the complaint and on that basis resisted the motion for summary judgment. The holding of this court in effect binds the Government strictly to its response to admissions and answers to interrogatories and brushes aside the allegations of control and supervision set forth in the complaint, apparently as not being binding upon the plaintiffs even though the general rule seems to be that the allega-



tions of the complaint for the purposes of the motion for summary judgment, if well pleaded must be taken as being true. *Reynolds v. Maples*, 214 F. 2d, 395, *Theobald Industries, Inc. v. U. S.*, 115 F. Supp. 699, *Smart v. U S.*, 111 F. Supp. 907, affirmed 207 F. 2d, 841.

In the case of *Lichon v. Eastern Airlines*, 87 F. Supp. 691, E. D. N. Y., 1949, which case was affirmed in 189 F. 2d, 939, it was held that where the defendant moved for summary judgment and the plaintiff made a cross-motion for summary judgment, the defendant admitted the facts alleged in plaintiff's complaint for the purposes of defendant's motion, but did not admit such allegations for the purposes of plaintiff's motion.

In this case the Government has been put in the peculiar position of having been sued on one theory and having obtained a summary judgment against the plaintiffs on that theory. Then the plaintiffs, despite the fact that they made a firm stand in favor of their complaint up until the court rendered its opinion on the summary judgment, turn around and attempt to amend their complaint. They deny the facts set forth in their complaint, shift the grounds for their complaint, and say, in effect, to the court: despite the fact that we were possessed of all of the information giving rise to these amendments *before you ruled on the motion for summary judgment*, and despite the fact that we made our stand on that motion, we now come into this court to say that our complaint was all wrong because we didn't have sufficient facts and therefore we wish to deny facts

that we have previously admitted and change the theory of our case.

We submit that there was neither error nor abuse of discretion in the trial court's denial of the leave to file the amendments to the complaint for the reasons that the trial court itself sets forth in its order dated March 3, 1955, (R. 59).

The court by its decision has limited drastically the value of Rule 56 and the summary judgment proceeding thereunder. If it is an abuse of discretion to refuse to allow an amendment to the complaint after the court has rendered its decision on the motion for summary judgment in a case where the plaintiff has had all necessary information for the amendment for almost three months, then it would be hard to find a case in which the refusal to allow the amendment would not be an abuse of discretion.

If the plaintiff can oppose the motion and stand on his complaint until after the decision and then completely shift his ground and amend his complaint as a matter of right,—of what use is the summary judgment proceedings?

## VI

If the court should affirm its decision as to all the other points raised herein, we then come to another question. On page 4 of the opinion the court states that "... the actual work thereon (on the dam) was being done by the independent contractors under contract let to them." If the amended complaint is allowed, then the plaintiff has admitted that the work

was being done under the contract. The interpretation of the contract is a matter of law. Therefore, this ruling would appear to be conclusive on the parties. The court, if it affirms its decision in all other respects, has then found that the complaint as amended does not allege any control in the Government. This would be in accord with its prior finding that the Bruce Mitchell Company was an independent contractor, since the prime prerequisite of the relationship of an independent contractor is the right to control the manner and detail of the work. 27 *AM. Jur. (Independent Contractors)*, Section 2., P. 481.

The appellants by interrogatory were requested to state fully and with particularity the negligent acts and omissions of the employees of the United States which appellants claimed caused the death of Kirk. In answer thereto they did not allege any negligent acts, but did allege negligent *omissions*, all of which related to the manner of the performance of the work by the independent contractor. This work, the court has found, under the allegations of the amended complaint, was under the control and direction of the independent contractor and was not under the control and direction of the employees of the United States. Where there is no right of control, there can be no liability for failure to act.

The general rule is that an employer is not liable for the torts of an independent contractor, or the latter's servants. 27 *Am. Jur. (Independent Contractors)*, Section 27, P. 504. There are no allegations in the amended complaint that would bring this

case under any of the exceptions to the rule, and there must be the right of control upon which to base a liability for failure to act. Under the court's findings and the negligent omissions as set out by the appellants, there is nothing to be tried, and the Government is entitled to a summary judgment.

If the court sends this matter back for trial under the facts as it has determined them to be, and as admitted by the appellants, it is setting a new precedent. This ruling would open the courts to a flood of litigation. Every employee of an independent contractor who receives any injury as a result of the negligence of the contractor or his employees can allege failure of the employees of the United States to inspect and be entitled to a trial of the action, even though, as found by the court here, the United States had no control over the manner and detail of doing the work.

We submit that if the amended complaint is accepted, appellants have then admitted the work was being done under the contract in the record. Such contract clearly establishes the relationship of an independent contractor who had control over the work being performed. The allegations of negligence when considered in relation to the contract establish that any negligence was the negligence of the independent contractor, and did not relate to any matter over which the employees of the United States

had any right of control. On the basis of the holdings of this Court, there is no reason to remand this case to the District Court for trial, and the decision of the District Court should be affirmed.

## CONCLUSION

We seriously contend that this decision will have a far reaching effect upon the tort liability of the United States of America in future cases—an effect never intended by Congress when it enacted the Federal Tort Claims Act and originally granted the consent for suit in tort against the United States.

Justice Reed in his dissent to the majority opinion of the Supreme Court in *Indian Towing Co. v. U. S.* 350 U. S. 61, expresses an opinion reflecting our views concerning the effect of the instant decision when he says on page 75:

“This enactment, like any other, should be construed so as to accomplish its purpose, but not with extravagant generosity so as to make the Government liable in instances where no liability was intended by Congress. It is certainly not necessary that every word in a statute receive the broadest possible interpretation. If Congress intended to create liability for all incidents not therefore actionable against suable public agencies, that intention should be made plain. The courts are not the legislative branch of the Government.”

Accordingly, we respectfully urge that appellees petition for rehearing be granted and that the judgment of the District Court for the District of Idaho, Southern Division, be, upon further consideration, affirmed.

Respectfully submitted,

SHERMAN F. FUREY, JR.,

*United States Attorney*

*for the District of Idaho*

By

JOHN T. HAWLEY

*Assistant U. S. Attorney*

No. 14767

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**United States  
Court of Appeals**  
*For the Ninth Circuit.*

UNITED STATES OF AMERICA,

Appellant,

VS.

HAROLD KENNEDY,

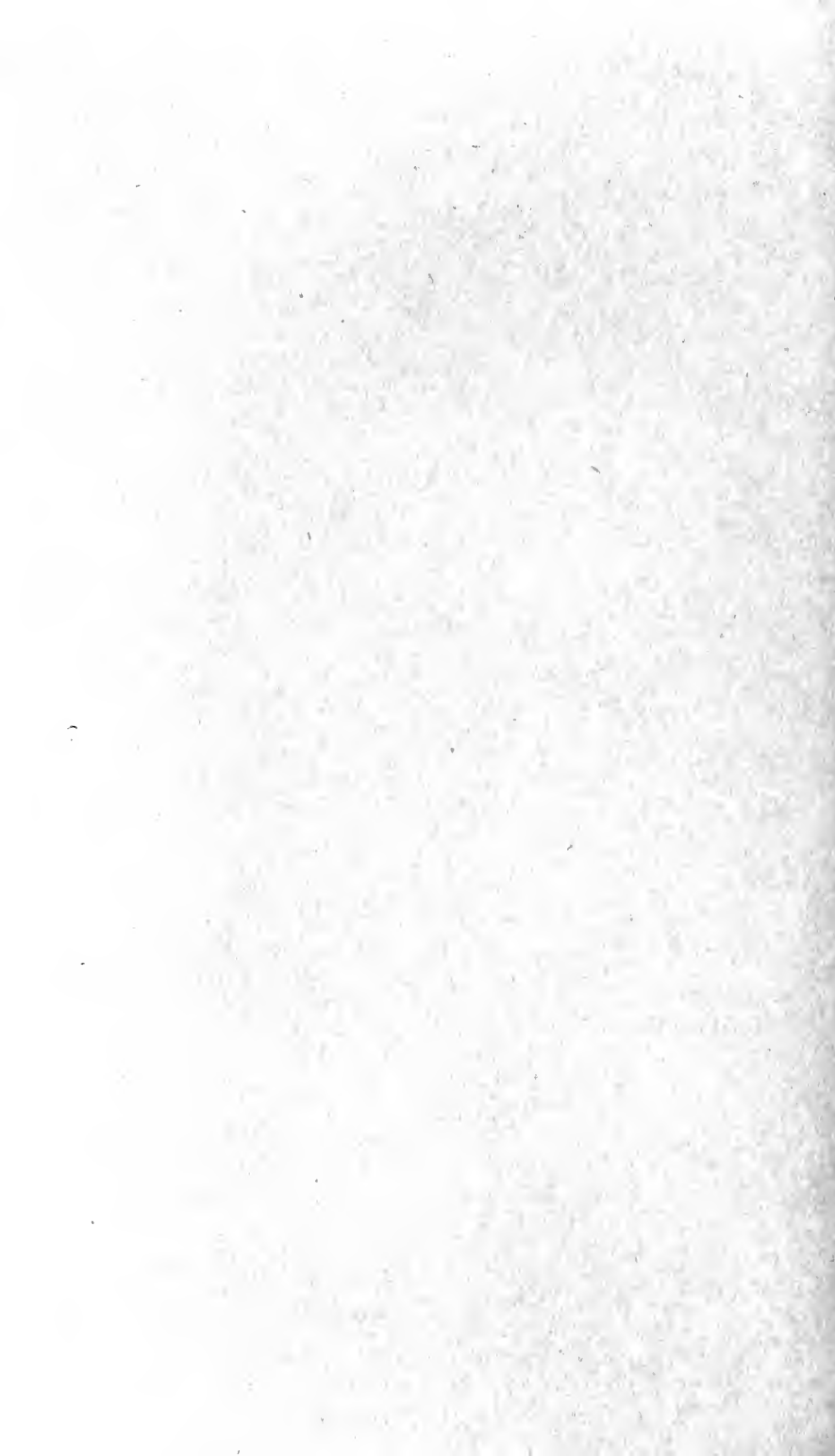
Appellee.

**Transcript of Record**

**Appeal from the United States District Court for the  
Western District of Washington,  
Northern Division.**

**FILED**

**AUG 30 1955**





No. 14767

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**United States  
Court of Appeals  
For the Ninth Circuit.**

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UNITED STATES OF AMERICA,  
Appellant,  
VS.  
HAROLD KENNEDY,  
Appellee.

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**Transcript of Record**

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**Appeal from the United States District Court for the  
Western District of Washington,  
Northern Division.**



## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF COUNSEL

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Seattle 4, Washington,

Attorneys for Appellant.

GEORGE J. TOULOUSE, JR.,

805 Arctic Bldg.,  
Seattle 4, Washington,

Attorney for Appellee.

cally during the month of January, 1954, Richard E. Mayer was a member of the Military Forces of the United States and was, on January 23, 1954, an employee of the United States Government and at all times referred to on said day was acting within the scope of his employment as a member of the Military Forces of the United States, and that at all times hereinafter referred to, Sergeant Richard E. Mayer was, in fact, proceeding and en route, pursuant to orders of Brigadier General Colbern, (said order being Special Order Number 2 of Headquarters, Fort Lewis, Washington, dated 5 January, 1954, and signed by Tito G. Moscatelli, Colonel, GS, Chief of Staff, made official by Jessee W. Scott, Chief Warrant Officer, United States Army, Assistant Adjutant General), to the Presidio at Monterey, California.

#### IV.

That U. S. Highway 99 is a state highway, running in a general northerly and southerly direction between the cities of Seattle and Tacoma, in the State of Washington.

#### V.

That on the 23rd day of January, 1954, plaintiff was proceeding in a northerly direction on U. S. Highway 99 and was in his own or easterly line of traffic. That at said time plaintiff was operating his own 1951 Packard automobile and was proceeding in a careful and prudent manner; that at a point on said highway, approximately 10½ miles south of Seattle, Richard E. Mayer was operating his automobile on said highway in a southerly direction.

being en route, pursuant military orders, to Monterey, California, when he carelessly and negligently, and without due care, crossed said highway and struck the automobile of the plaintiff, causing severe damage to the automobile of the plaintiff and severe injuries to the person of the plaintiff. That at said time and place said Sergeant Richard E. Mayer was negligent, which negligence was the proximate cause of plaintiff's damage hereinafter described in the following particulars:

1. In violating the statutes of the State of Washington governing the operation of automobiles upon the highways of the State of Washington;

2. In failing to maintain a lookout for the plaintiff's automobile on plaintiff's side of said highway;

3. Driving his automobile at said time and place on the wrong side of the roadway when he knew, or had reason to know, that plaintiff's automobile was occupying said portion of the roadway;

4. In operating his automobile at an excessive speed in view of the weather conditions then and there obtaining on said highway.

## VI.

That as a direct and proximate result of the afore-said described negligence on the part of Staff Sergeant Richard E. Mayer, said plaintiff has suffered the following damages:

1. An extensive laceration of the forehead with avulsion of the scalp, and moderately severe concussion of the brain, shock, a laceration of the right

knee and leg; traumatic phlebitis of the right leg; large residual scar of the forehead and leg which is permanent.

2. Damage to his automobile in the sum of \$1,318.81, said figure being arrived at through its being the reasonable depreciated value of said automobile before and after the collision herein described.

3. Loss of suit of clothes—\$80.35.

4. Loss of use of automobile, being expense incurred to rent an automobile—\$244.97.

5. Medical and hospital expenses in the sum of \$444.80.

6. General damages for pain, suffering and residual permanent injuries in the sum of \$7,500.00.

Wherefore, plaintiff prays for judgment against the United States of America in the sum of Nine Thousand Five Hundred Eighty-eight and 93/100 (\$9,588.93) Dollars, and that his attorneys be awarded twenty per cent. (20%) of any amount awarded by the Court herein as compensation for their services herein, and for his costs to be taxed herein.

GEORGE R. MOSLER, and  
GEORGE J. TOULOUSE, JR.,

/s/ GEORGE R. MOSLER,

/s/ GEORGE J. TOULOUSE, JR.,  
Attorneys for Plaintiff.

[Endorsed]: Filed April 16, 1954.



[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, through its attorneys and for answer to plaintiff's complaint alleges and denies as follows:

I.

Admits paragraphs I and II.

II.

In answer to paragraph III defendant states that Sergeant Richard E. Mayer was a member of the military forces of the United States during the time in question; that Sgt. Mayer was required by official orders, signed as described in the complaint, to report for duty at the Presidio, Monterey, California, by midnight the 28th of January and further denies each and every allegation contained in said paragraph of the complaint except as hereinabove admitted.

III.

In answer to paragraph IV defendant admits the same.

IV.

In answer to paragraph V defendant admits that plaintiff was proceeding north on Highway 99, operating his 1951 Packard automobile; further admits that Sgt. Mayer was proceeding southerly; that a collision occurred at a point on said highway south of Seattle; defendant, however, denies each and every allegation of said paragraph, including with-

out limitation all specifications of negligence therein set forth.

V.

In answer to paragraph VI defendant denies each and every allegation therein set forth.

Affirmative Defense

I.

By way of further answer and affirmative defense, defendant alleges that the damages to plaintiff, if any, were caused by the negligent operation of plaintiff's automobile and in no part caused by any negligence on the part of Sgt. Richard E. Mayer or of defendant.

/s/ CHARLES P. MORIARTY,  
United States Attorney;

/s/ F. N. CUSHMAN,  
Assistant U. S. Attorney,  
Attorneys for Defendant.

Receipt of copy attached.

[Endorsed]: Filed June 23, 1954.

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[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now the plaintiff and by way of amended complaint against the defendant, alleges as follows:

I.

That the plaintiff, Harold Kennedy, was at all times referred to herein and is now a resident of

King County, Washington, and a resident of the Judicial District of the United States District Court, for the Western District of Washington, Northern Division.

## II.

That the plaintiff invokes the jurisdiction of the above-entitled Court, pursuant to the provisions of 28 U.S.C.A. 1346(b) and 28 U.S.C.A. Sec. 2671, et seq.

## III.

That on the 23rd day of January, 1954, Staff Sergeant Richard E. Mayer was a member of the Military Forces of the United States, an employee of the United States of America, and at all times referred to on said day was acting in line of duty and within the scope of his employment. That at the time of the accident herein referred to said Richard E. Mayer was in fact proceeding as directed and pursuant to that certain order Number 2, dated 5 January, 1954, and reading as follows:

“SFC Richard E. Mayer RA 19 319 029 Hq & Hq Co 16th Sig Bn Corps rel asg trf WP Army Language Sch Presidio of Monterey, Calif., at the time rept to Comdt thereat NLT 2400 hrs 28 Jan., 54, for purpose of attending forty-six wks Chinese Mandarin Language Crse. Ten (10) ADALVAHP 2/pt of delay Seattle, Wash., prior to rept to sch. EM rept AG-C Post for Con US records check prior to departure fr this sta. TC may determine common carr and furn nec trans and meal tickets and/or FC will pay alws auth by JTR. Subj EM chargeable against the Army Language Sch quota allotted to

Asst Ch of Staff GI. Auth: 6th Ind Hq 6A  
AMAGP-2 201 12 Nov., '53. PCS TPA TDN 2142010  
401-6-206-18 P 1410-02 03 07 S 99-999. EDCSA: 14  
Jan., '54.

By Command of Brigadier General Coldern:  
Official.

TITO G. MOSCATELLI,  
Colonel, GS  
Chief of Staff.

JESSE W. SCOTT,  
CWO, USA,  
Asst. Adj. Gen."

That under the terms of said order said Richard E. Mayer was directed to proceed to the Presidio of Monterey, California, and was, under the terms of said order, authorized to travel by his privately owned automobile, and under the terms of said order, was entitled to be paid mileage at the rate of six (6c) cents per mile for the official distance of 1,001 miles to the Presidio of Monterey, California; that the said Richard E. Mayer was in fact so paid by the defendant herein for the mileage in question—all as provided for in said Special Order Number 2 and under the Joint Travel Regulations issued by the Department of Defense of the United States of America; that at the time of the occurrence of the accident hereinafter described said Richard E. Mayer was in fact proceeding to the Presidio of Monterey, California, by his own privately owned automobile and that it was necessary for said Rich-

ard E. Mayer to be so traveling on said 23rd day of January, 1954, in order to traverse the distance to the Presidio of Monterey, California, as contemplated by the Joint Travel Regulations of said Department of Defense, and in order to report to the Presidio of Monterey, California, not later than 2400 hours (at 12:00 o'clock at night) on the 28th day of January, 1954.

#### IV.

That U. S. Highway 99 is a state highway, running in a general northerly and southerly direction between the cities of Seattle and Tacoma, in the State of Washington.

#### V.

That on the 23rd day of January, 1954, plaintiff was proceeding in a northerly direction on U. S. Highway 99 and was in his own or easterly line of traffic. That at said time plaintiff was operating his own 1951 Packard automobile and was proceeding in a careful and prudent manner; that at a point on said highway, approximately 10½ miles south of Seattle, Washington, Richard E. Mayer was operating his automobile on said highway in a southerly direction, being en route, pursuant said Special Order Number 2 hereinbefore set forth, to the Presidio of Monterey, California, when he carelessly and negligently, and without due care, crossed said highway and struck the automobile of the plaintiff, causing severe damage to the automobile of the plaintiff and severe injuries to the person of the plaintiff. That at said time and place said Richard E. Mayer was negligent, which negligence was the

proximate cause of plaintiff's damage, hereinafter described, in the following particulars:

1. In violating the statutes of the State of Washington governing the operation of automobiles upon the highways of the State of Washington;

2. In failing to maintain a lookout for the plaintiff's automobile on the plaintiff's side of said highway;

3. In driving his automobile at said time and place on the wrong side of the roadway when he knew, or had reason to know, that plaintiff's automobile was occupying said portion of said roadway;

4. In operating his automobile at an excessive rate of speed in view of the weather conditions then and there obtaining on said highway.

## VI.

That as a direct and proximate result of the aforesaid described negligence on the part of said Richard E. Mayer, said plaintiff has suffered the following damages:

(1) An extensive laceration of the forehead with avulsion of the scalp, and moderately severe concussion of the brain, shock, a laceration of the right knee and leg; traumatic phlebitis of the right leg; large residual scar of the forehead and leg which is permanent.

(2) Damage to his automobile in the sum of \$1,-318.81, said figure being arrived at through its being

the reasonable depreciated value of said automobile before and after the collision herein described.

(3) Loss of earnings in the sum of \$200.00.

(4) Medical and hospital expenses in the sum of \$444.80.

(5) General damages for pain, suffering and residual permanent injuries in the sum of Seven Thousand Five Hundred and No/100 (\$7,500.00) Dollars.

Wherefore, plaintiff prays for judgment against the defendant United States of America in the sum of Nine Thousand Four Hundred Sixty-Three Dollars and Sixty Cents and that his attorneys be awarded twenty per cent. (20%) of any amount awarded by the Court herein as compensation for their services herein, and for his costs to be taxed herein.

/s/ GEORGE J. TOULOUSE, JR.,

/s/ GEORGE R. MOSLER.

GEORGE R. MOSLER, and  
GEORGE J. TOULOUSE, JR.,  
Attorneys for Plaintiff.

[Endorsed]: Filed December 27, 1954.

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[Title of District Court and Cause.]

MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS

The complaint in this case charges that one Richard E. Mayer, a soldier in the United States Army,

while driving his own automobile en route to a new duty station in San Francisco, negligently caused a collision on January 23, 1954, on U. S. Highway 99, south of Seattle, thereby causing damages to the plaintiff.

It is pleaded and admitted that Sergeant Mayer was traveling pursuant to paragraph 13 of Special Orders Number 2 issued by the proper authorities at his former duty station, Fort Lewis, Washington. A copy of an extract from said orders showing paragraph 13 in its entirety is attached to this memorandum as Exhibit A. An agreed translation of those orders follows:

#### EXHIBIT A

Thirteen: Sgt. 1/c Richard E. Mayer, RA (Regular Army) 19319029 Headquarters and Headquarters Company, 16th Signal Battalion Corps released assigned and transferred will proceed to Army Language School, Presidio of Monterey, California, at the proper time report to the Commander thereat no later than 2400 hours, 28 Jan., 1954, for the purpose of attending 46 weeks Chinese-Mandarin language course. Ten (10) days delay leave at home point with point of delay at Seattle, Wash., prior to reporting to school. Enlisted man to report to Adjutant General—C (Section) Post Headquarters, for continental U. S. records check prior to departure from this Station. Transportation Corps may determine common carrier and furnish necessary transportation and meal tickets and/or Finance Corps will pay allowances authorized by the Joint Travel Regulation. Subject enlisted man chargeable



against the Army Language School quota allotted to the Assistant Chief of Staff G-1. Authorization: Sixth Indorsement Headquarters, 6th Army, Presidio-2, 201 (Subject's personnel file) 12 Nov., 1953. Permanent change of station, travel by private owned vehicle is authorized travel direct as necessary. (The numerals after TDN refer to the account number allotted for funds in this type of transfer which pertains only to the Finance Corps.) EDCSA means Effective Date of Change of Strength Accountability: Jan. 14, 1954."

Based on the above facts, plaintiff contends that the United States is thereby liable for his damages under Title 28, U.S.C. 1346 b, which reads in part:

"\* \* \* The District Courts \* \* \* shall have exclusive jurisdiction of civil actions on claims against the United States \* \* \* for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment \* \* \*"

Title 28, U.S.C., Sec. 2671, defines:

" 'Acting within the scope of his office or employment' in the case of a member of the military or naval forces of the United States, means acting in line of duty."

Defendant in this motion contends that plaintiff has not stated a cause of action inasmuch as the facts pleaded show that Sergeant Mayer was not within the scope of his employment at the time of

the accident in question for purposes of the Tort Claims Act.

It was thought that there had been some conflict in the earlier decisions over the applicable law governing the determination of scope of employment. The 4th Circuit clearly determined this question in *U. S. vs. Sharpe*, 189 F.(2d) 239, at p. 241, stating:

“We look to the federal law and decisions to determine whether or not the person who inflicted the injury was an employee of the government—acting within the scope of his office or employment. We look to the local law for the purpose of determining whether the act with which he is charged gives rise to liability.”

This phase of the *Sharpe* decision was cited with approval by the 9th Circuit in *Williams v. U. S.*, 215 F.(2d), 800, at least insofar as it applied to a member of the armed forces. In the *Williams* case the court referred to the question of a soldier's status for Tort Act purposes as a status:

“\* \* \* quite different from the status of either an employee serving a private employer or a civilian employee serving the U. S. \* \* \*”

and at p. 807 stated:

“But in dealing with the problems of federal liability for tortious acts of members of the military and naval forces a wholly different situation is presented because Congress saw fit to adopt a drastic modification of this ‘master and servant’ doctrine. By carefully chosen language it delimited the area

of federal liability for tortious acts of members of this group by specifically providing that so far as concerns such acts, the phrase 'acting within the scope of his office or employment' shall mean 'acting in line of duty' \* \* \*. Congress made abundantly plain that federal liability can arise only when the tort-feasor member of our military or naval forces was actually 'acting in line of duty.' \* \* \* We must (as we do in this case) hold that 'acting in line of duty' means acting in line of military duty."

Therefore, we see that the test of scope of employment in this case is to be determined only by reference to federal decisions. In addition, however, we find under the Williams case, 9th Circuit, that even if the serviceman's action might be within the "scope," as found in a federal case involving a non-serviceman, that additional tests must be met under the statute because of the peculiarities of the relationship between a serviceman and the Government as termed "line of military duty." Other circuits have merely ruled that the phrase "line of duty" does not extend the rule of respondent superior and that the term "line of duty" was used because it more correctly described action representing the Government than "scope of employment." *U. S. v. Eleazer*, 177 F(2d) 914, 918; *Campbell v. U. S.*, 177 F(2d) 200.

The facts in the instant case show that an army enlisted man was given orders transferring him permanently from his station at Fort Lewis, Pierce County, Washington, to the Presidio at San Francisco; that he was given leave in the Seattle area

to catch a military train was not actionable against the United States. In the Campbell case the Court held that "line of duty" had not expanded the traditional "scope of employment," for Tort Act purposes even though the term had been interpreted more loosely for many intra-service situations. The Court said at p. 503, "to give it (scope of employment) a new and entirely different meaning, the greatly expanded one attributed to "in line of duty" when members of the armed forces themselves are claimants, is nothing more than an attempt to put the cart before the horse \* \* \*."

Attached hereto as Exhibit "B" is an opinion from the District Court for the District of Maryland in the case of Paly v. U.S., not reported, which is probably the latest of the cases analogous to the instant fact situation. This case confirms the "scope of employment" test and upon application of the Federal Decisions decides that the United States cannot be liable where a serviceman uses his own car unless the United States be able to control such vehicle, at p. 12.

For the foregoing reasons it is respectfully urged that defendant's action be dismissed.

/s/ CHARLES P. MORIARTY,  
United States Attorney;

/s/ F. N. CUSHMAN,  
Asst. United States Attorney.

EXHIBIT B

In the United States District Court,  
for the District of Maryland

Civil Action No. 6587

HARRY PALY,

vs.

UNITED STATES OF AMERICA.

Filed November 5, 1954

OPINION AND ORDER

Chestnut, District Judge:

This suit against the Government to recover damages for personal injuries is based on the Federal Tort Claims Act (28 U.S.C.A., particularly sections 1346, 2671, 2674). The plaintiff Harry Paly, was seriously injured on a Maryland highway in a collision between his Studebaker passenger automobile and a Dodge passenger automobile driven by David Stefan. The latter was an enlisted member of the United States Naval Forces stationed at the Patuxent River Base in Maryland, and had been ordered to act as a military escort for the body of another enlisted man who had recently died at the Station. In order to attend the funeral in Baltimore, Stefan was driving from the Base toward Baltimore in his own privately owned automobile. The United States defends the suit on two separate grounds (1) that the accident and resulting injury to the plaintiff was not caused by the negligence of

Stefan and (2) in any event the defendant is not liable because Stefan at the time was using his own privately owned automobile without orders to do so. I will discuss these two questions separately.

The principal and controlling facts with respect to the circumstances of the accident can be briefly stated. The collision occurred about 12:10 a.m., on January 6, 1953, on Route 301, about 5 miles south of Upper Marlboro, the County Seat of Prince George's County, Maryland. The weather was clear and the road was dry and the particular place was entirely unlighted. The improved asphalt roadway at that point was 18 feet wide with a gravel shoulder of 3 feet on each side. The plaintiff, a traveling salesman, was driving along in his automobile from New York to his business territory in North Carolina. He had spent the prior day in Elkton, Maryland, about 100 miles away, to have repairs to or replacements of some bearings in his car and had been instructed by the mechanic not to drive the car for the next 50 or 100 miles in excess of 35-40 miles an hour. The maximum speed limit at the place was 50 miles an hour. The collision occurred just a few feet or yards north of a sharp curve to the right for a motorist driving north. The plaintiff was driving south and Stefan was driving north. Both were alone in their respective cars. There were no witnesses to the accident other than the respective drivers. The noise of the crashing cars was heard by some neighbors whose house was about 100 yards to the north. An ambulance was immediately telephoned for and arrived in a few minutes. A

County police officer was also summoned and arrived in about 15 minutes. Photographs were immediately taken showing the condition of the roadway and the position of the cars respectively which had not been moved before the arrival of the officer.

The plaintiff testified that he had been driving for several hours at approximately 35 miles an hour pursuant to the advice of the mechanic at Elkton; but that by virtue of head injuries sustained as a result of the collision he had retrograde amnesia and was unable to remember particularly any incidents immediately leading up to the collision. Stefan testified that as he was approaching the right hand curve which was shortly north of the crest of a slight rise or upgrade in the road, he saw first the lights of the southbound plaintiff's car which appeared to him to be coming directly toward him; that he dimmed his lights but, thinking that the plaintiff's car was on the wrong side of the road, and fearing that there was an embankment rising from the gravel road surface on his right, his best choice to avoid a collision was to swing his own car to the left across the white line indicating the center of the road, in an attempt to pass the plaintiff's car on the far side of the southbound lane. It is contended for the defendant that Stefan was confronted with an emergency and that he was justified in intentionally crossing into the wrong lane to avoid the collision. The Maryland statutes, however, explicitly provide that automobiles shall be driven on the right half of the roadway; and in intentionally swinging his car to the left

across the middle of the roadway Stefan was clearly violating the Maryland highway traffic statute. Maryland Code of 1951, Art. 66 $\frac{1}{2}$ , ss. 182, et seq.

There is no sufficient evidence in the case to show that the plaintiff's car was proceeding otherwise than in accordance with the Maryland statute other than Stefan's statement that he thought the plaintiff's car was on the wrong side of the road, and it is quite possible that this thought on his part was caused by the position of the plaintiff's car in approaching the crest of the slight hill and the curve of the road. Much more importantly, however, is the evidence of several disinterested witnesses as to the location of debris resulting from the collision consisting of dirt, glass particles, rust, etc., and a gouge in the road surface resulting from the collision. All these marks and indications as to the place of collision were definitely on the southbound roadway, that is the plaintiff's proper side of the road. Furthermore, the photographs of the position of the cars taken promptly after the accident showed that the plaintiff's car was far to the right on the southbound lane and the car driven by Stefan, while in the northbound lane, was near the center line.

Counsel for the defendant contends that considering the whole evidence in the case it is too slight and uncertain to make a finding that the collision was due solely to the negligence of Stefan. But after much thought about it I have concluded to the contrary. Two facts stand out clearly. One is that the collision did in fact occur in the plaintiff's southbound lane, and the other is that Stefan stated that



he did in fact intentionally cross over the white center line from his lane into that of the plaintiff. He stated his justification for thus violating the applicable Maryland statutory law was that he was faced with a sudden emergency and that he had to exercise instantaneously his best judgment to avoid a seemingly otherwise certain collision. After considering carefully his testimony on this point in the light of all the other facts of the case and considering the width and condition of the roadway and the circumstantial evidence of the place of collision and the position of the cars after the collision, I do not find that he was justified in the very unusual action that he took. It presented an issue of fact to be decided by a jury, or the trier of the facts. Consolidated Gas Elec. Lt. & Power Co. vs. O'Neill 175 Md. 47. It may be considered that he acted in good faith but it was evidently a very hurried and very unwise action. Indeed it was an extremely hazardous thing to do in view of the limited width of the roadway. An examination of the photographs taken at the time will show it was utterly improbable, if not absolutely impossible, for him to have succeeded in avoiding the plaintiff's car by crossing into the southbound lane. And it may also be noted from the evidence that Stefan first noted what he thought was the position of the plaintiff's car in the northbound lane when it was about 150 feet away; but it does not appear that he attempted to stop by vigorously applying his brakes or sounding his horn as a warning signal to the other car. Nor is there any satisfactory evidence other than Stefan's expressed belief as to

the position of the plaintiff's car to show that the latter was in fact traveling in whole or in part in the northbound lane. I think the whole evidence shows that if Stefan had complied with the statutory requirement to keep to his right of the road a collision would not have occurred as at the time of the collision the plaintiff's car was on his right side of the road.

The defendant's second ground of defense requires a careful consideration of the applicable law. Before answering the complaint the defendant filed a motion for judgment on the pleadings on the ground that the defendant was not liable as a matter of law for Stefan's negligence, if any. At the time, an affidavit was submitted which in substance was to the effect that he was traveling in his own automobile without express order to that effect, but to carry out the order to act as military escort for a deceased member of the Naval Forces. A copy of the order was also filed. In the argument on the motion counsel for the Government stressed the point that Stefan was using his own automobile to drive from Patuxent River Naval Base to Baltimore, a distance of more than a hundred miles, without any order as to his mode of travel and that he determined for himself to use his private automobile although to be reimbursed for his expenses in accordance with general authorized practice in such matters. In overruling the motion without prejudice I filed a short memorandum opinion to the effect that the point of law was not sufficiently clear merely on the papers filed in support of the motion to decide the question

at that time, and it was pointed out that probably a hearing of the case at a trial would result in developing the applicable Navy instructions or regulations, customs and practices in relation to the duties of Navy personnel assigned to act as military escort. The evidence in this case has now developed seemingly as fully as possible just what were at the time the applicable Naval instructions or practices upon the subject. They will be stated as briefly as possible.

Lt. Comdr. Martz, stationed at Washington, D. C., is the chief administrative official of the Bureau of Naval Personnel in charge of the naval escort program, the basic statute for which is 34 U.S.C.A., s. 923. He explained that the purpose of appointing a naval escort for a deceased member of the Naval Forces was not only as a courtesy or honor to the next of kin, but that the person so appointed as a naval escort should have the responsibility for the safe and prompt delivery of the body of the decedent to the next of kin; and that it was also the duty of the escort to attend the funeral if desired by the next of kin. In the ordinary course the program is carried out in the following way. When the death of a member of the Naval Forces occurs his next of kin is immediately notified and asked whether a naval escort is desired, and if so, what recommendations, if any, the next of kin desires to make. Upon receiving an affirmative request and recommendation by the next of kin, another member of the Naval Forces of equivalent rank to that of the decedent is

at once appointed as a naval escort, whose duty it is to accompany the body of the decedent by suitable transportation facilities, dependent upon the residence of the next of kin, and to attend the funeral.

Stefan's orders in the instant case referred specially to the Bureau of Personnel Manual, Art. C-9810, a copy of which has been filed in this case as defendant's Ex. 3-D. With more particular reference to the mode of travel to be used by the naval escort, Commander Martz referred to travel instructions (see Defendant's Ex. 3-A), which provided in substance that travel orders would be issued in each case and "when government transportation (including government air) is not available, issuing commands will make necessary arrangements as required in current transportation directives, wherein it will be noted travel orders will normally authorize travel by common carrier of passengers by railroad, bus, ship and air, etc."

It will be noted that this was in force in January, 1953, and did not make any reference to the use of privately owned automobiles by Naval personnel assigned to duty as naval escort. Commander Martz further pointed out, however, that as of June 23, 1953, general travel instructions for Navy personnel (including but not specifically for naval escort) were revised and Bureau of Personnel Instructions 1326.2 provided in section 6, printed page 4, that when deemed in the interest of the United States for the particular purpose to be served, written travel orders could specifically authorize Naval personnel to travel by private automobile; but such an order should

never be given merely for personal convenience of the individual (Defendant's Ex. 3-B); but there is no evidence to suggest that the general revision of travel instructions dated June 23, 1953, was in any wise due to or caused by the instant case.<sup>1</sup>

In the instant case the naval escort program at Patuxent River Base, comprising Naval personnel of about 7,000, was in charge of the Medical Department at the Base. Warrant Officer Mitchell of that Department was in charge, of the naval escort program. Edward J. Smutniak, stationed at Solomon's Island, Maryland, under the Patuxent River command, died on January 4, 1953. Warrant Officer Mitchell, acting through his aide, Chief Petty Officer Potts, at once advised the father of Smutniak, resident in Baltimore City, of the death of his son and inquired whether it was desired to have some one attend as a naval escort and if so, who was recommended. Smutniak's father promptly telephoned the Chaplain that a naval escort was desired and recommended the appointment of Stefan who was a cousin, also in the Service at the Base. The message was communicated to Warrant Officer Mitchell's office. Mitchell went off duty at 4:30 p.m., leaving

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<sup>1</sup>In this connection it may be noted that in the case of *Jozwiak v. United States*, 123 F. 2d 65 (D.C., Ohio) the facts stated show that the government official whose travel was there involved was specifically authorized by his written travel order in 1949 to use his own automobile but to be reimbursed only upon a showing that it was of advantage to the government to do so.

the matter in charge of Potts. Stefan had been on duty the night of January 4th but learning of the death of his cousin Smutniak, he had the next day, when on liberty, driven in his own automobile to be with his family thinking that possible information might be desired with respect to the circumstances of Smutniak's death, which was understood to have been a suicide caused by mental impairment. Stefan's liberty from the Service was for the day and he was not required to report to the Base until 8:45 p.m. In the meantime during the day the body of Smutniak had been removed by the locally engaged mortician to his funeral home in Leonardtown, Maryland, a few miles away from the Base, for preparation for burial. In ordinary routine Stefan as naval escort for the body would have proceeded from the Base to Leonardtown and from there would have traveled with the body in the mortician's vehicle to Baltimore; but for some reason not clearly explained in the evidence the mortician proceeded to transport Smutniak's body to Baltimore without waiting for the arrival of the naval escort. Stefan reported back for duty at the Base about 8:30 p.m., and at once met Warrant Officer Potts who had learned that the mortician had already left Leonardtown with Smutniak's body. Before Stefan reported Potts had previously telephoned instructions to the personnel office at the Base to issue travel orders to Stefan as the naval escort for Smutniak's body. Knowing that the mortician had previously left for Baltimore, Potts, when he saw Stefan, told him that

he, Stefan, had been appointed as the naval escort and that as the mortician was already on his way to Baltimore with Smutniak's body he, Stefan, should "get going" on his way to Baltimore. And that he should go to the personnel office for his written orders. Potts gave Stefan to take to Smutniak's next of kin some comparatively minor personal effects which had belonged to Smutniak, and the things customarily given to a naval escort. Potts knew that Stefan owned an automobile and may have known that Stefan had used it in going to and returning from Baltimore that day; but nothing was said by Potts or Stefan about what means of transportation should be used by Stefan. There was a bus line, however, which ran from the gate of the Naval Station to Baltimore which was available for and could be used by Naval personnel desiring to go to Baltimore. Just what the bus schedule was did not appear. There were also official cars at the Station which could be made available for necessary transportation. Nor was there any evidence that I recall as to the stated time for the funeral in Baltimore and it does not appear that Stefan was informed as to the time for the funeral although there was evidence that it did not in fact occur until January 8th.

The written order for Stefan's assignment is to be found in the record filed with the original motion of the defendant for a dismissal of the complaint. It is dated January 5, 1953, addressed to Stefan assigning him to temporary additional duty with a reference thereon to the Bureau of Personnel

Manual, Art. C-9810 heretofore referred to. In substance the material part of the order detailed Stefan as a naval escort for the late Edward J. Smutniak and continued "when directed by proper authority, you will proceed on or about 5 January, 1953, and accompany the remains from U. S. Naval Air Station, Patuxent River, Maryland, to Duda Funeral Home, Baltimore, Maryland. In carrying out these orders you will be responsible for the safe delivery of the remains at Baltimore and will attend the funeral and burial service unless contrary to the wishes of the next of kin. Upon completion of the funeral or burial services you will return to this Command. Authorized to travel at own expense subject to reimbursement. Expense of this temporary additional duty is chargeable to Appn. 173002.40, Medical Care, Navy 1953, Program Allot, 30000 O.C. 023 NAA 5023." The duration of Stefan's additional duty was for approximately 3 days and upon completion thereof Stefan was to return to the Base and resume his regular duties. The estimated cost of transportation, \$90.00, per diem \$21.00. The order also provided that the per diem in the execution of these orders is authorized in accordance with U. S. Naval Travel Instructions and Joint Travel Regulations for the Uniformed Services.

Stefan testified that upon leaving Officer Potts he went at once to the office of the Officer of the Day and received the written orders which he glanced at but did not critically or carefully read. It was the first time that he had received such an order but presumably he was not entirely unfamiliar



with such orders as he had been working in the Medical Department at the Base for some time past. Stefan made no inquiries about bus transportation to Baltimore as he decided to use his own automobile and about 10:30 in the evening he began his drive to Baltimore, the accident occurring a little after midnight when he had proceeded about 50 miles from the Naval Base. He himself was injured by the collision and was temporarily hospitalized but later returned to active duty.

On these facts the Government contends that there is no liability under the Tort Claims Act because at the time and place of the accident Stefan was not acting within the scope of his employment. Section 1346(b) of 28 U.S.C.A provides in part that the United States shall be liable “for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government *while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*” (Italics supplied.) And section 2671 “Definitions” provides in part “acting within the scope of his office or employment, in the case of a member of the Military or Naval Forces of the United States, means acting in ‘line of duty.’ ” And section 2674 provides in part—“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under the circumstances, but

shall not be liable for interest prior to judgment or for punitive damages.”

It is now well settled, at least in this Fourth Circuit, that in determining whether the agent or employee was acting in the line of duty and in the scope of his employment with relation to the United States, we must refer to federal law; but that in determining whether a private individual under like circumstances would incur liability we must refer to the law of the State where the alleged tort occurred. *United States v. Eleazer*, 177 F. 2d. 914, cert. den. 339 U.S., 903; *United States v. Sharpe*, 189 F. 2d 239. In both these cases injuries to third persons occurred while military personnel were driving their own private automobiles for transportation from one official station to another and while temporarily on “leave status.” In both cases the government was held not liable because the employees were under the circumstances not acting within the scope of their employment.

These provisions of the Act plainly state that the United States, in consenting to be sued for damages occasioned by the alleged negligence of its agents or employees, had limited its liability to those cases only in which the facts show that the agent or employee was acting within the scope of his employment at the time, and in the case of military personnel, if also acting in the line of duty, but then only if the liability of an individual employer under like conditions is established by the law of the State where the injury occurred. Otherwise stated, in the

instant case the plaintiff must show that Stefan was at the time of the injury acting (1) in the line of duty and (2) in the scope of his employment consistent with the Maryland law.

The phrase "scope of employment" is one of legal art which has long been directly associated with the general doctrine of "respondent superior." The phrase restricts the scope of the liability of the principal or master to cases where a servant is acting within the scope of his employment. And it is another generally accepted rule in this branch of the law that the employee was not acting within the scope of his employment unless at the time and place of the tort the principal or master has a right to control the servant's actions. This has been so fully and clearly explained in the decisions of the Fourth Circuit above cited that it is quite unnecessary here to elaborate the point. Particularly applicable here is a statement of the rule by the late Judge Walter H. Sanborn which is quoted in Judge Parker's opinion in the Eleazer case, 177 F. 2d, at page 916:

"The test of one's liability for the act or omission of his alleged servant is his right and power to direct and control his imputed agent in the performance of the causal act or omission at the very instant of the act or neglect. There can be no recovery of a person for the act or omission of his alleged servant under the maxim, 'respondent superior,' in the absence of the right and power in the former to command or direct the latter in the performance of

the act or omission charged, because in such a case there is no superior to respond."

Where the injury results from the use by the employee of a particular instrumentality, as in this case a private automobile, to render the master liable on the principle of respondent superior it must appear that the use of the instrumentality by the employee was under such conditions that he did not have a free hand in its use but was in that respect also subject to the master's control. This is pointed out particularly in A.L.I. Restatement of Agency at pages 539-549, cited with approval in Judge Parker's opinion on page 916. It is also clearly pointed out in the Eleazer case, *supra*, that the phrase "line of duty" in the Act as applicable to military and naval personnel does not expand the phrase "scope of employment" as generally understood in the legal doctrine of respondent superior.

In the instant case I think it is clear enough that in going to Baltimore to attend the funeral of Smutniak, Stefan was acting in the line of duty; but the question presented is whether at the time of the accident he was also acting within the scope of his employment under both the federal and the Maryland law. The facts of the particular case are certainly very unusual if not quite unique. None of the government officers in charge of the naval escort program had ever heard of a case in which the person assigned as naval escort had used a private automobile for that purpose. As already stated, except for the fact that the mortician had started

for Baltimore without waiting for the naval escort, Stefan would have ridden in the mortician's vehicle carrying the decedent's body. As Stefan did not receive his orders until after the mortician had left with the body it was, of course, impossible for him to perform that portion of the order which required him to proceed with the funeral cortege as escort. The remaining part of his duty covered by the order was to attend the funeral and incidental thereto to discharge that portion of the duties of the naval escort relating to contact with the next of kin at the burial service. The question in this case comes down to this—was Stefan acting in the scope of his employment in driving his privately owned automobile to Baltimore? There was clearly no express authority to do so either written or verbal. The written order stated that he was “authorized to travel at own expense subject to reimbursement.” This is not an uncommon provision with respect to travel by federal employees. Its purpose is to provide that the employee will be reimbursed for the expense which he incurs in accordance with federal law at the rate applicable to the particular case. 5 USCA, s. 837.

I find nothing in the instructions for Naval personnel to warrant a conclusion that Stefan was impliedly directed to use his own automobile in this case. The form of instructions issued in June, 1953, did specifically provide that travel by privately owned automobile was not authorized unless the written orders so specified. While this latter in-

struction was not issued until some months after the accident in this case, Commander Martz, in charge of the whole Naval Escort Program, said that it had not changed the practice. No instance has been called to my attention in which Naval personnel were directed in their orders to use private automobiles for escort duty; and, as previously stated, Commander Martz had never heard of any case in which the naval escort had in fact used his own automobile.

Nor do I find any federal decision which would support the conclusion that Stefan was acting in the scope of his employment in the use of his private automobile in this case. The question as to the liability of the government for negligence in the operation of a privately owned automobile by a member of the Military or Naval Forces has arisen and been decided in several Federal decisions. Although I have found no case involving facts similar to the instant one the principle applied in nearly all of them is the same as in the opinion in the Eleazer and Sharpe cases, *supra*, in this Circuit. Some of the decisions in other Circuits are *Rutherford v. United States*, 73 F. Supp. 867 (D.C. Tenn.), *affd.* 168 F. 2d 70 (6th Cir.); *Bach v. United States*, 92 F. Supp. 715 (D.C.N.Y.); *Jozwiak v. United States*, 123 F. Supp. 65 (D.C. Ohio). The Sharpe and Eleazer cases in this Circuit also involve the use of privately owned automobiles by military personnel. To the same effect in principle see *United States v. Campbell*, 172 F. 2d 500 (5th Cir.)

cert. den. 337 U.S. 957, involving a pedestrian collision between Naval personnel and a third person. In all these cases the government was held not liable for the alleged torts of its employees. The only case that I have found in which the government was held liable for the negligent use of a privately owned automobile by its employees is *Marquardt v. United States*, 115 F. Supp. 160 (D.C. Calif.) not involving military personnel but relating to travel by an engineer to perform work on a rush military project.

There are a number of Maryland cases involving liability of an employer for the negligent operation by an employee of the latter's privately owned automobile; but I do not find in them any principle of law contrary to or inconsistent with the view of the scope of employment as expressed in the *Eleazer* and *Sharpe* cases in this Circuit. The principle that is applied throughout is whether on the particular facts the employee was authorized by the employer, either expressly or impliedly, to use his automobile in the performance of his duties. Where the employee does use his own automobile for his own convenience and without such authority from the employer it is held in effect that the latter is not liable because under the circumstances he does not have the right to direct and control the employee in the use of the automobile. In some of the cases it is said that in the latter situation the real status of the employee is that of an independent contractor rather than that of a mere servant or employee. In

general I think it can properly be said that the principle applied by the Maryland cases is not substantially different from the general law of agency with respect to the doctrine of respondent superior. The fullest discussion of the law applicable to the particular subject is to be found in *Henkelmann v. Metropolitan Life Ins. Co.*, 180 Md. 591, and *Great Atlantic & Pacific Tea Co. v. Koppenberger*, 171 Md. 378. In the latter case, at page 392, reference is made to section 239 of A.L.I. Restatement of Agency which is discussed in Judge Parker's opinion in the *Eleazer* case. Other Maryland cases dealing with the use by employees of private automobiles are *Goldsmith v. Chesebrough*, 138 Md. 1; *Regal Laundry Co. v. A. S. Abell Co.*, 163 Md. 525; *Zink v. State*, 132 Md. 670; *Wood v. Gossard*, 204 Md. 177. For a general discussion of the requirement as to scope of employment to hold an employer liable on the doctrine of respondent superior, not involving a private automobile, see *East Coast Freight Lines, Inc., vs. Mayor & City Council of Baltimore*, 190 Md. 256. In A.L.I. Restatement of Agency (1936) Maryland Annotations, we find in the discussion of section 239 of the Restatement headed "Use of unauthorized instrumentality"—

"The Maryland cases are in accord with the results stated herein in situations where an employee without authorization uses an instrumentality in his master's business and in cases where the servant is authorized to use his own instrumentality in his master's affairs. No cases seem to discuss the effect



of the use of an instrumentality in an employer's business with his authorization but without his assuming any control over its use."

Particularly in point here also is *Alfred Khoury v. Edison Elec. Illuminating Co.*, 265 Mass. 256, 60 A.L.R. 1159, where the factual situation is in principle quite similar to the instant case although dealing with a civil and not a government employee.

It was said:

"In order that the relation of master and servant may exist, the employee must be subject to control by the employer, not only as to the result to be accomplished but also as to the means to be used."

This case was cited with approval in the *Henkelmann and Neppenberger Maryland* cases, *supra*. The same effect, and much in point here on principle and somewhat analogous facts is *Conversion & Surveys, Inc., v. Roach*, 204 F. 2d 499 (1st Cir.), 1953, opinion by Chief Judge Magruder.

In the instant case there was no evidence that Stefan had ever previously used his own automobile for government business; and there is therefore no suggestion that his use of it in the particular case was induced by prior knowledge, approval or acquiescence of his superior officers. He was directed to travel at his own expense subject to reimbursement at authorized rates but there was no direction to him either written or verbal to use his own automobile. His use of it was perhaps a natural and reasonable one on his own part under the circumstances but it was at his own election to do so and for his conveni-

ence at the time. Certainly the government had no right or power to control his manner of driving his own vehicle. If the accident had been caused not by his unfortunate error of judgment in driving, but by virtue of some mechanical defect in the operation of the steering mechanism it could hardly be thought that the government would be liable therefor as it had no interest in or ownership of the vehicle and no duty of inspection or repair, and so far as we know, no official knowledge even that Stefan owned an automobile, which apparently he used from time to time at his own convenience when off duty. Its use by him at the time was for his own convenience in going to Baltimore to comply with that part of his orders to attend the funeral services. He could have elected to travel by common carrier bus line or could have requested transportation in an official car from the Naval Station to Baltimore. While different in degree I think the situation is not different in principle from that of travel by a clerk of the court who is required to attend a session of court at a place distant from his official office, in which case, as stated in Judge Parker's opinion in the Eleazer case, the United States would not have been liable for the negligent operation of his automobile on the way. Similar situations in principle would seem to arise where other government officials such as Judges, United States Attorneys and others are required to attend for the performance of official duties at points distant from their official residence, in which case, as is generally known, they are at liberty if they personally prefer,

to use private automobiles and to be compensated therefor at the proper applicable rates under federal law. While the Eleazer and Sharpe cases in this Circuit differ on the factual situations particularly in the government, officials respectively were on leave of absence at the time, although generally pursuing a route to a long distant destination pursuant to orders, I feel constrained to hold that the principle that is applied in these cases is likewise applicable here and for that reason the complaint must be dismissed.

Having reached this conclusion, it is of course unnecessary to consider what would be the amount of compensatory damages to the plaintiff for the injuries that he sustained. But as the evidence has been very fully presented on both sides it is possible that a finding on that point might be useful and save time and expense of a new trial of the case in the event of disagreement by the Appellate Court with the conclusions here reached, if an appeal should be taken. I followed a somewhat similar course in the case of *Jefferson v. United States*, 77 F. Supp. 706; *affd.* 178 F. 2d 518; *affd.* 340 U.S. 135.

The plaintiff was severely injured by the collision. He had a fracture of the skull, a comminuted fracture of the kneecap, a broken arm, a dislocated hip, a broken cervical vertebrae and a partial paralysis of the sixth cranial nerve, causing double vision. He was hospitalized with many separate surgical operations over a period of more than a year. He was forced to wear casts on his body for many months. He sustained numerous bruises and lacera-

tions, some of which have left scars. But by virtue of very skillful surgery he has had a remarkably successful recovery and an avoidance of any permanent major disability. His hospital and doctors' expenses, or so-called out-of-pocket expenses, amounted to \$5,213. His automobile, valued at about \$1800, was totally destroyed. However, his counsel states that he was reimbursed for this loss except to the extent of \$50 by an insurance company, which, however, has not joined in this suit, and is not represented by the plaintiff's attorney, who has expressed the preference that that item should not be included in the damages.

The plaintiff's age at the time of the accident was 25 years. He had had a high school and partial college education, but since leaving college his average annual net income from earnings had not exceeded about \$1,000. For some months before the time of the accident he had been employed as a traveling salesman with a small salary and over-all commission for supervision of other salesmen. His net income for about 8 months of the year, however, as shown by his income tax returns did not amount to more than a few hundred dollars. He had prospects, however, of greater profits later. At the present time he is employed as a clerk in an insurance office at a salary of \$65 a week, which is more than his earnings in any prior year. At the trial of the case he appeared to be in normal health and physical ability and of more than average intelligence. He is apparently able without difficulty to read, walk and pursue ordinary activities not

involving unusual effort or strain. As a result of his very remarkably successful surgical treatment his present physical disability consists of 15% to 20% limitation of the motion of the neck; 10% to 15% limitation in the use of the left hip; 20% to 25% limitation in the right kneecap. His broken arm healed normally and he has no present disability to the lumbar region of the spine. He still has some double vision amounting to possibly 25% impairment of the use of the eyes owing to double vision at certain angles which, it is said, could be largely corrected by a not-too-dangerous and not-very-expensive operation in shortening one of the muscles controlling the rotation of the eyes. He is able to read without difficulty and perform clerical duties. He lost 16 months of gainful activity and suffered long and severe pain and discomfort from his injuries. His life expectancy at 25 was 43 years. Considering all these factors I reach the conclusion that if the defendant were liable the amount of a reasonably compensatory verdict would be \$35,000.00.

For the reasons stated it is Ordered this 5th day of November, 1954, by the United States District Court for the District of Maryland that the complaint in this case be and the same is hereby dismissed.

/s/ W. CALVIN CHESNUT,  
U. S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed December 27, 1954.

[Title of District Court and Cause.]

## ANSWER TO AMENDED COMPLAINT

Comes now the defendant, United States of America, through its attorneys, and for answer to plaintiff's Amended Complaint alleges as follows:

### I.

In answer to paragraphs I, II, IV, V and VI of this Amended Complaint, defendant hereby incorporates by reference, as if set forth herein in full, the answer made to these numbered paragraphs in the original complaint.

### II.

In further answer to paragraph III of plaintiff's Amended Complaint, defendant admits all the allegations therein contained except that defendant specifically denies that Mayer was acting in line of duty or within the scope of his employment, and further denies that it was necessary for Mayer to be traveling on January 23, 1954, in order to traverse the distance to the Presidio of Monterey, California, as contemplated by the Joint Travel Regulations of said Department of Defense, and in order to report to the Presidio of Monterey, California, not later than 2400 hours on the 28th of January, 1954. Defendant does, however, admit the applicability of the Joint Travel Regulations to the trip in question.

Wherefore, having fully answered, defendant prays that plaintiff be denied any and all relief

against said defendant and that this cause of action be dismissed with prejudice.

/s/ CHARLES P. MORIARTY,  
United States Attorney;

/s/ F. N. CUSHMAN,  
Asst. United States Attorney.

Receipt of copy attached.

[Endorsed]: Filed December 28, 1954.

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[Title of District Court and Cause.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

The above matter coming on regularly before the undersigned Judge of the above-entitled Court and a trial having been had on the 28th day of December, 1954, the plaintiff appearing in person and through his attorneys, George J. Toulouse, Jr., and George R. Mosler, and the defendant appearing by its attorney, Chas. P. Moriarty, United States District Attorney, and being represented at said trial by F. N. Cushman, Assistant United States District Attorney, and witnesses having been sworn and testified and the Court having heard the evidence and now being fully advised in the premises, makes and enters the following

Findings of Fact

I.

That the plaintiff, Harold Kennedy, was at the time of the commencement of the above-entitled

action a resident of the Judicial District of the United States, for the Western District of Washington, Northern Division.

## II.

That the plaintiff invokes the jurisdiction of this Court under Title 28, U.S.C.A., Section 1346 (b), and Title 28, U.S.C.A., Sections 2671, et seq.

## III.

That on the 23rd day of January, 1954, Staff Sergeant Richard E. Mayer was a member of the Military Forces of the United States, an employee of the United States of America, and at all times referred to on said day was acting in line of duty and within the scope of his employment. That at the time of the accident herein referred to, said Richard E. Mayer was in fact proceeding as directed and pursuant to that certain order Number 2, dated 5 January, 1954, and reading as follows:

“Sfc Richard E Mayer RA 19 319 029 Hq & Hq Co 16th Sig Bn Corps rel asg trf WP Army Language Sch Presidio of Monterey Calif at the time rept to Comdt thereat NLP 2400 hrs 28 Jan 54 for purpose of attending forty-six wks Chinese-Mandarin Language Crse. Ten (10) ADALVAHP 2/pt of delay Seattle Wash prior to rept to sch. EM rept AG-C Post Hq for ConUS records check prior to departure fr this station. TC may determine common carr and furn nec trans and meal tickets and/or FC will pay alws auth by JTR. Subj EM chargeable against the Army Language Sch



quota allotted to Asst Ch of Staff GI. Auth: 6th Ind Hq 6A AMAGP-2 201 12 Nov 53. PCS TPA TDN 2142010 401-6-206-18 P 1410-02 03 07 S 99-999. EDCSA: 14 Jan 54.

By Command of Brigadier General Colgern:

**TITO G MOSCATELLI**

Colonel, GS Chief of Staff

Official:

**JESSE W. SCOTT**

CWO USA Asst Adj Gen"

That the abbreviation "TPA" in the above-described order means "Travel by personal automobile or vehicle is authorized." That the abbreviation "TDN" means "The travel directed (in the order) is necessary to comply with the order."

That under the terms of said order said Richard E. Mayer was directed to proceed to the Presidio of Monterey, California, and was, under the terms of said order, authorized to travel by his privately owned automobile, and, under the terms of said order, was entitled to be paid mileage at the rate of six (6c) cents per mile for the official distance of 1,001 miles to the Presidio of Monterey, California; that the said Richard E. Mayer was in fact so paid by the defendant herein for the mileage in question—all as provided for in said Special Order Number 2 and under the Joint Travel Regulations issued by the Department of Defense of the United States of America; that at the time of the occurrence of the accident hereinafter described said

Richard E. Mayer was in fact proceeding to the Presidio of Monterey, California, by his own privately owned automobile and that it was necessary that he eventually make and he was making that trip within the scope of his authority from the defendant on said 23rd day of January, 1954, in order to traverse the distance to the Presidio of Monterey, California, as contemplated by the Joint Travel Regulations of said Department of Defense, and in order to report to the Presidio of Monterey, California, not later than 2400 hours (at 12:00 o'clock at night) on the 28th day of January, 1954.

The Court further finds that on January 23, 1954, the defendant, United States of America, acting through its appropriate officers, could at all times control Staff Sergeant Richard E. Mayer in his actions in the same manner that a private employer might have control over him, had Staff Sergeant Richard E. Mayer been in the employ of such private employer. That the travel herein involved was in the interest of the employer, the United States of America, and necessitated by the interest of the employer and not by the interest of Staff Sergeant Richard E. Mayer; that the work which the employer, the United States of America, desired Staff Sergeant Richard E. Mayer to perform, namely: to study the Chinese-Mandarin language—not for his benefit but for the benefit of the United States of America—created the necessity for the travel herein involved, and that under the law of the State of Washington where this accident happened a private

employer would be liable for similar acts committed by his employee.

#### IV.

That U. S. Highway 99 is a state highway, running in a general northerly and southerly direction between the cities of Seattle and Tacoma, in the State of Washington.

#### V.

That on the 23rd day of January, 1954, plaintiff was proceeding in a northerly direction on U. S. Highway 99 and was in his own or easterly line of traffic. That at said time plaintiff was operating his own 1951 Packard automobile and was proceeding in a careful and prudent manner; that at a point on said highway, approximately 10½ miles south of Seattle, Washington, Richard E. Mayer was operating his automobile on said highway in a southerly direction, being en route, pursuant to said Special Order Number 2 hereinbefore set forth, to the Presidio of Monterey, California, when he carelessly and negligently, and without due care, crossed said highway and struck the automobile of the plaintiff, causing severe damage to the automobile of the plaintiff and severe injuries to the person of the plaintiff. That at said time and place said Richard E. Mayer was negligent, which negligence was the proximate cause of plaintiff's damage, hereinafter described, in the following particulars:

1. In violating the statutes of the State of Washington governing the operation of automobiles upon the highways of the State of Washington;

2. In failing to maintain a lookout for the plaintiff's automobile on plaintiff's side of said highway ;

3. In driving his automobile at said time and place on the wrong side of the roadway when he knew, or had reason to know, that plaintiff's automobile was occupying said portion of said roadway ;

4. In operating his automobile at an excessive rate of speed in view of the weather conditions then and there obtaining on said highway.

That the defendant United States of America has admitted in open court its liability under this paragraph.

## VI.

That as a direct and proximate result of the aforesaid-described negligence on the part of said Richard E. Mayer, said plaintiff has suffered the following damages :

(1) An extensive laceration of the forehead with avulsion of the scalp, and moderately severe concussion of the brain, shock, a broken rib, a laceration of the right knee and leg ; traumatic phlebitis of the right leg ; large residual scar of the forehead and leg which are permanent.

(2) Damage to his automobile in the sum of \$1,318.81, said figure being arrived at through its being the reasonable depreciated value of said automobile before and after the collision herein described.

(3) Special damages for medical and hospital expense and general damages for pain and suffer-

ing and residual injuries in the sum of Three Thousand Two Hundred Fifty and no/100 (\$3,250.00) Dollars.

## VII.

That plaintiff's attorneys should be awarded twenty (20%) per cent of the amount of any judgment awarded by the Court herein, as compensation for their services to plaintiff in this action.

From the foregoing Findings of Fact, the Court now makes and enters the following

## Conclusions of Law

### I.

That the plaintiff is entitled to judgment against the defendant, United States of America, in the sum of Four Thousand Five Hundred Sixty-eight and 81/100 (\$4,568.81) Dollars, together with interest thereon at the rate of four (4%) per cent per annum from the date of the entry of said judgment until paid.

### II.

That plaintiff's attorneys, George J. Toulouse, Jr., and George R. Mosler, should be awarded twenty (20%) per cent of the amount of said judgment as and for attorneys' fees for services performed in this case.

Done in Open Court this 30th day of December, 1954.

/s/ JOHN C. BOWEN,  
U. S. District Judge.

Presented and approved by:

/s/ GEORGE J. TOULOUSE, JR.,  
Of Attorneys for Plaintiff.

Approved:

CHAS. P. MORIARTY,  
U. S. District Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed December 30, 1954.

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In the United States District Court for the Western  
District of Washington, Northern Division

No. 3689

HAROLD KENNEDY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

### JUDGMENT

The above-entitled matter coming on regularly before the undersigned Judge of the above-entitled Court and a trial having been had on the 28th day of December, 1954, the plaintiff appearing in person and through his attorneys, George J. Toulouse, Jr., and George R. Mosler, and the defendant appearing by its attorney, Chas. P. Moriarty, United States District Attorney, and being represented at said

trial by F. N. Cushman, Assistant United States District Attorney, and witnesses having been sworn and testified and the Court having heard the evidence and being fully advised in the premises, and having heretofore, in writing, rendered, made and entered its Findings of Fact and Conclusions of Law herein, now, therefore,

It Is Ordered, Adjudged and Decreed that the plaintiff have and recover judgment against the defendant, United States of America, in the sum of Four Thousand Five Hundred Sixty-eight and 81/100 (\$4,568.81) Dollars, together with interest thereon at the rate of four (4%) per annum from the date of entry of this judgment until paid, and together with his taxable costs herein in the further sum of \$19.00.

It Is Further Ordered, Adjudged and Decreed that the plaintiff's attorneys, George J. Toulouse, Jr., and George R. Mosler, be awarded twenty (20%) per cent of the amount of the judgment herein awarded to plaintiff, as and for their services as attorneys for the plaintiff in this cause.

Done in Open Court this 30th day of December, 1954.

/s/ JOHN C. BOWEN,  
U. S. District Judge.

Presented and approved by:

/s/ GEORGE J. TOULOUSE, JR.,  
Of Attorneys for Plaintiff.

Approved:

CHAS. P. MORIARTY,  
U. S. District Attorney;

By /s/ F. N. CUSHMAN,  
Assistant U. S. District  
Attorney.

[Endorsed]: Filed and entered December 30,  
1954.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

To: Harold Kennedy, plaintiff, and to George J.  
Toulouse, Jr., his attorney:

Notice is hereby given that defendant herein, the  
United States of America, hereby appeals to the  
Circuit Court of Appeals for the Ninth Circuit from  
that Judgment entered in the above-entitled cause  
on the 28th day of December, 1954.

Dated this 24th day of February, 1955.

/s/ CHARLES P. MORIARTY,  
United States Attorney;

/s/ F. N. CUSHMAN,  
Assistant U. S. Attorney.

[Endorsed]: Filed February 24, 1955.



[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKETING  
RECORD ON APPEAL

On motion of defendant, United States of America, and Affidavit of F. N. Cushman, attached thereto, being considered by the Court, now therefore, it is hereby

Ordered that the time for docketing the record on appeal in this cause be, and it is hereby extended to and including May 1, 1955.

Done in Open Court this 24th day of March, 1955.

/s/ JOHN C. BOWEN,  
United States District Judge.

Presented and approved by:

/s/ F. N. CUSHMAN,  
Assistant U. S. Attorney.

The Plaintiff hereby consents to the entry of the foregoing order.

/s/ GEORGE J. TOULOUSE, JR.,  
Attorney for Plaintiff.

Receipt of copy attached.

[Endorsed]: Filed March 24, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKETING  
RECORD ON APPEAL

On motion of defendant for an additional twenty-one days in which to docket record on appeal in the above-entitled case, the matter being considered by the Court, now therefore, it is hereby

Ordered that the time for docketing the record on appeal in this cause be, and it is hereby further extended, from May 1, 1955, to and including May 22, 1955, which date is less than ninety days from February 24, 1955, the date of filing Notice of Appeal herein.

Done in open Court this 27th day of April, 1955.

/s/ JOHN C. BOWEN,  
United States District Judge.

Presented and approved by:

/s/ F. N. CUSHMAN,  
Attorney for Defendant.

The Plaintiff hereby consents to the entry of the foregoing order.

/s/ GEORGE J. TOULOUSE, JR.,  
Attorney for Plaintiff.

[Endorsed]: Filed April 27, 1955.

In the District Court of the United States for the  
Western District of Washington, Northern  
Division

No. 3689

HAROLD KENNEDY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

## TRANSCRIPT OF PROCEEDINGS

Before: The Honorable John C. Bowen,  
District Judge.

December 28, 1954

This matter came on for trial before the Honorable John C. Bowen, Judge of the above-entitled Court, on Tuesday, December 28, 1954, at 10:00 o'clock a.m., plaintiff appearing by George R. Mosler, Esq., 2207 Northern Life Tower, Seattle, Washington, and George J. Toulouse, Jr., Esq., 805 Arctic Building, Seattle, Washington, and the defendant appearing by Francis N. Cushman, Assistant United States Attorney, U. S. Courthouse, Seattle, Washington. During the course of said trial the following testimony was given by Joseph John Cichy and the following oral decision was made by the Court.

## JOSEPH JOHN CICHY

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Toulouse:

Q. Will you state your name?

A. Joseph John Cichy.

Q. Will you spell your last name?

A. C-i-c-h-y.

Q. And your rank?

A. Chief Warrant Officer. [2\*]

Q. And that is in the United States Army?

A. Yes, sir.

Q. Is that the Regular Army?

A. Regular Army.

Q. And what is your particular specialty?

A. I am a personnel officer.

Q. Now, in Army orders, what do the abbreviations TDN mean?

A. Travel directed is necessary.

Mr. Cushman: Your Honor, just for the purposes of the record, I wonder if perhaps we could qualify him as an expert to interpret the order. I wonder if you have asked enough questions.

Mr. Toulouse: Well, I think he has qualified himself. He said he was a warrant officer. I will ask him a few more questions.

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\*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Joseph John Cichy.)

Q. (By Mr. Toulouse): You are a warrant officer or an adjutant in the United States Army?

A. That is correct.

Q. Are you familiar with the rules and regulations of the United States Army governing the issuance of orders to subordinate members of the Armed Forces in the United States Army?

A. Yes, sir, to the best—— [3]

Q. And I will ask you whether or not you have examined the Special Order Number 2, Headquarters at Fort Lewis, dated 5 January, 1954, issued to Staff Sergeant Richard E. Mayer on the 4th day of January, 1954, which is part of the pleading in this case?

A. Yes, sir, I examined the extract, not the order.

Q. You examined the extract of the order applying to Sergeant Mayer? A. Yes, sir.

Q. Now, I will ask you, in that order appears the abbreviation WP. Will you state what that means? A. WP means "Will proceed."

Q. Now, I will ask you what does the abbreviation PCS in that order mean?

A. Permanent Change of Station, sir.

The Court: You may ask him the next question.

Q. What does the abbreviation TPA mean?

A. Travel by private, either automobile or vehicle, is authorized.

Q. Now, I will ask you, what does the abbreviation TDN in that order mean?

A. Travel directed is necessary.

(Testimony of Joseph John Cichy.)

The Court: If necessary?

The Witness: Travel directed is necessary. [4]

Q. (By Mr. Toulouse): Is necessary in the interests of the United States?

A. Yes, that is what it implies. We just normally state travel directed is necessary for the accomplishment of——

The Court: I do not know the word between “directed” and “necessary.”

The Witness: Is.

The Court: Is there an “if” in there?

The Witness: No, sir.

The Court: Travel directed——

The Witness: Is necessary.

Q. (By Mr. Toulouse): Sergeant, I will ask you whether or not there is an abbreviation TDN in the manual of the Adjutant General, is there not?

A. Yes, there is.

Q. And opposite that an abbreviation all warrant officers in the Armed Forces of the United States are authorized to use, the abbreviation TDN, as meaning the travel—referring to the travel involved in the order—directed in the order—T meaning travel—D meaning directed—is necessary in the interests of the United States. Isn’t that what it means? Doesn’t it mean [5] the travel directed is necessary in the interests of the United States?

A. Well, I wouldn’t say in those words, no.

Q. Well, will you put it in your words?

A. Travel directed is necessary to comply with the order, because—well——

(Testimony of Joseph John Cichy.)

Q. Now, I will ask you whether or not you are familiar with the official travel regulations for the determination of travel time between two points for enlisted men? Are you familiar with those regulations?

A. Let us say I am familiar with them.

Q. Do you know whether or not for purposes contemplated by the Joint Travel Regulations that a person on a travel status is assumed to travel 250 miles per day?

A. Yes, sir, that is correct. That is authorized.

The Court: 250 miles per day is an authorized day's travel?

The Witness: Yes, sir, by the Joint Travel Regulations.

Q. (By Mr. Toulouse): Now, you are likewise familiar, are you not, Sergeant—I mean Warrant Officer Cichy—with the Articles of War which I understand are now denominated the Articles, which require that all enlisted personnel obey a competent order, are you not? [6] A. Yes, sir.

Q. And state whether or not Sergeant Mayer in this case would be subject to court-martial if he failed to report to the Presidio at Monterey, California, at midnight on the 28th day of January, 1954?

A. He would not be subject to court-martial until such time as it was proven that his failure to arrive was due to his own negligence.

Q. I will state it another way. If he wilfully disobeyed the order and did in fact report one

(Testimony of Joseph John Cichy.)

minute after midnight on the 29th day of January, 1954, he would be subject to court-martial, is that not correct?      A. Yes, sir, that is right.

Q. And that under the terms of this order he was required to report at not later than midnight on the 28th day of January, 1954, is that correct?

A. Yes, sir, that is correct.

Q. Now, will you state as to whether or not you are familiar with the power of a commanding officer of the United States to control a non-commissioned officer of the United States at any point or at any place where that sergeant may be?

A. You are speaking of disciplinary control?

Q. Yes. I will ask you the specific question. Could Brigadier General Colbern or Tito G. Moscatelli, his [7] Chief of Staff, have changed Staff Sergeant Mayer's orders on January 23, 1954, had they seen fit to so change those orders?

A. Yes, sir. The publishing authority has the authority to change.

Q. The issuing authority has a right to control, do they not, the movement of any sergeant in the United States Army at any time?

The Court: If the sergeant is allotted to the command?

Mr. Toulouse: That is what I said—The issuing officer.

A. Yes, right. Your question was a little bit—

Q. Then, in this case, if Brigadier General Colbern, the Chief of Staff, or any of his subordinate officers, had decided to direct Sergeant Mayer to



(Testimony of Joseph John Cichy.)

remain at Fort Lawton they would have had a right and power to do so, is that correct?

A. Yes, sir, they would have.

Q. They would likewise have a right and power to cancel his leave at any time, is that correct?

A. Yes, sir.

Q. They would likewise have a power to direct him to go to any place in any different station in the United States other than the Presidio at Monterey had they [8] chosen to, is that not correct?

A. Yes.

Q. They would likewise have a right to tell him to proceed by air or by bicycle, had they chosen, is that not correct?

A. Yes, sir, that is correct.

Q. You are likewise familiar, are you not, Warrant Officer, that under the regulations of the United States Army that an enlisted staff sergeant while en route pursuant to travel orders is in fact in the line of duty within the contemplation of the regulations of the United States Army?

A. Yes, sir, in line of duty, speaking of line of duty.

Q. That is correct, is it not?

A. (Witness nods head affirmatively.)

The Court: At this point we will take a ten-minute recess.

(Recess.)

Mr. Cushman: The doctor is here, your Honor.

The Court: I wish him to be accommodated first.

(Testimony of Joseph John Cichy.)

The witness will temporarily be withdrawn and you may call the doctor.

(Whereupon Mr. Cichy was temporarily withdrawn from the witness stand. At the conclusion of [9] Dr. Vukov's testimony, the following occurred:)

The Court: I ask the witness on the stand who was interrupted to resume the stand.

(Mr. Cichy resumed the stand for further interrogation.)

Mr. Toulouse: I think that is all.

The Court: You may cross-examine.

### Cross-Examination

By Mr. Cushman:

Q. Mr. Cichy, I will now read this language to you. I am reading from the order. (Reading.) "The Transportation Corps may determine common carrier and furnish necessary transportation and meal tickets and/or Finance Corps will pay allowance authorized by Joint Travel Regulations." Now, as an everyday operating feature, what is meant by those provisions?

Mr. Toulouse: I object to this witness or any witness attempting to explain that particular statement. It is free of any ambiguity. It doesn't in any way involve a symbol. It is plain, common, everyday ordinary language. There is no pleading affirmatively of any custom or practice.

(Testimony of Joseph John Cichy.)

The Court: I would say the objection, so far as it has gone, seems to be subject to favorable [10] consideration by the Court unless counsel offering the testimony wishes first to show that there is some ambiguity or some special meaning in the Armed Forces or that it does not have its ordinary meaning in the Armed Forces or in connection with this subject here, something to indicate some need for explanation.

Q. (By Mr. Cushman): Mr. Cichy, are you in a position where you are normally involved in the preparation of travel orders?

A. Yes, sir, I am.

Q. And in the preparation of travel orders, are there circumstances which make one order substantially different from the next? A. Yes, sir.

Q. I ask you in this case what kind of a transfer does this order involve?

A. A permanent change of station.

Q. And that is opposed to what?

A. Temporary duty travel which would be going from his home station to another station and back to his home station.

Q. In other words, he was going to be permanently assigned to a new station?

A. Yes, sir.

Q. And he had been assigned where? [11]

A. Fort Lewis, Washington.

Q. And now he was going to be assigned where?

A. Well, at the language school at Monterey, California.

(Testimony of Joseph John Cichy.)

Q. At what date was he to be transferred as far as his Army paper work is concerned?

A. The EDCSA indicated in the order, I believe, was the 13th of January, was it not? The 13th or the 14th.

Q. Yes, the 14th of January, and what does that term mean?

A. That term means that the station from which he is being transferred will drop him from their strength account and the station that is gaining him will pick him up on their strength account, in other words, on their morning report as we call it.

Q. From which station will orders be given to this individual during the times in question here, assuming as we have, a delay en route, and then an allowance for travel, assuming those, and assuming this change of strength accountability that you just mentioned, from which station would his future orders emanate after the day of this change of strength accountability?

Mr. Toulouse: I object to that, your Honor, because that, of course, is controlled as a matter [12] of law by the Articles and the Articles of War and by the Army regulations. Either station can direct.

The Court: I have not seen the Articles in evidence yet.

Mr. Toulouse: Well, your Honor, the Articles are a part of the statutory law appearing in 50 Appendix War, Title U.S.C.A.

Q. (By Mr. Cushman): Are there official regulations on this subject, Mr. Cichy?

(Testimony of Joseph John Cichy.)

The Court: The objection is sustained. You may ask him another question.

A. Yes.

Mr. Cushman: Well, your Honor, I was merely going to ask the witness if there were regulations.

The Court: That objection as stated is sustained so that the record will be clear. You may proceed with proper interrogation, including the last question, which had not yet been answered. The answer should be yes or no. In addition to the statute, is what you mean, is it not?

Mr. Cushman: Yes, your Honor.

The Witness: Well, may I ask—

The Court: You just answer that question yes or no, if you know. [13]

The Witness: Well, the way the question was put I can't say yes, there are.

The Court: Well, can you say no, there are not?

The Witness: I can't say no, there are not, either.

The Court: Well, then, is it true that you do not know the answer to the question as put?

The Witness: Well, the question as put—

The Court: All right. Ask him another question.

Q. (By Mr. Cushman): We have in this order EDCSA 14th of January, 1954. Are there any Army regulations that you know of, and are you familiar with those regulations, which would inform you as to which station, whether the former station or the new station, would be the station to have

(Testimony of Joseph John Cichy.)

whatever control over this man the Army would have during the period after leaving Fort Lewis until the time he reports at the Presidio in Monterey? A. Yes, sir.

Q. And what station do those regulations provide would control?

Mr. Toulouse: I object to that. The regulations would be the best evidence if it is an [14] independent regulation.

The Court: Is the plaintiff going to introduce the regulations?

Mr. Cushman: I don't have the regulations, your Honor. Your Honor, the regulations are so very voluminous. Well, in this particular instance, the regulations are so very voluminous and they only have one official copy of them that was available, so we aren't able to put them in evidence.

The Court: You should be able to. The objection is sustained. You should be able to have a copy of it or have it here and read from it, or you should do something. The witness should not be permitted to state from his own mind, I do not think. If you have a copy of something that you think the witness would recognize, after showing it to opposing counsel, you might feel advised to ask a question based upon some copy or something, but as to whether or not you wish to proceed further, you may proceed.

Mr. Cushman: Yes, your Honor.

Q. (By Mr. Cushman): You had stated that this was a permanent change of station?

(Testimony of Joseph John Cichy.)

A. Yes, sir.

Q. You are continually preparing orders for the transfer [15] of individuals from your post to other posts?

The Court: Well, why do you not ask him a question? I think now that counsel should apply the ordinary usual standard of cross-examination. Ask him. Do not make statements in the record that are neither a question nor an answer. I wish you to proceed. We are spending a lot of time fooling around here right now.

Q. (By Mr. Cushman): What control does the Army have over a man when he is traveling?

A. Well, they have disciplinary control over him from the time he departs the station until the time he arrives at his new station.

Q. What is disciplinary control?

A. He is subject to all the laws of the land, the same as any civilian walking down the street.

Q. And are there any particular military aspects of this?

A. Only the fact that he was picked up by civilian police. If the offense was such as to warrant being turned over to military authorities, they would turn him over to the closest military authorities.

Q. And when Army personnel are transferred from one post to the next— [16]

Mr. Toulouse: I object to that, your Honor, as irrelevant and immaterial.

The Court: The objection is overruled.

(Testimony of Joseph John Cichy.)

Q. (By Mr. Cushman): When Army personnel are transferring from one post to the next and, as in this case, when they are to report on a specific day, can the Army exercise any control over the individual that would be any different, prior to the date of reporting, can they exercise any control over the individual that they could not exercise over a man who was merely on leave?

Mr. Toulouse: Just a second. I object to the question on the grounds that it poses a hypothetical that is irrelevant and immaterial to any issue framed by these pleadings, and furthermore that it calls for this warrant officer to interpret the Articles of the United States that are the statutes of the United States with respect to enlisted men obeying all lawful orders of superior officers or to interpret a regulation of the Army.

The Court: I am so convinced of this witness' intelligence and discriminatory reasoning powers and frankness to believe that it is safe for him to receive such a question, and the objection is overruled. I caution the witness not to answer it [17] unless you feel you know the answer and are certain of it.

Read the question.

(The last question is read by the reporter.)

A. The control is exactly the same regardless of circumstance.

Q. (By Mr. Cushman): Now, you had testified in answer to question by plaintiff about the mileage



(Testimony of Joseph John Cichy.)

allowance for a person who was transferred, and I believe you stated that it was 250 miles a day?

A. Yes, sir.

Mr. Cushman: I think we have agreed, counsel, that the distance in this case was 1,001 miles?

Mr. Toulouse: Yes.

Q. (By Mr. Cushman): How many days' travel time would that provide?

A. 250 divided into your 1,000 would be roughly four days.

Q. And what about the one mile?

A. The one mile wouldn't make any difference because the Finance Officer has the final say-so and it would be computed as part of the fourth day.

Q. Now, when are Army personnel permitted to travel in their own private automobiles while [18] en route pursuant to orders or on duty?

Mr. Toulouse: That is irrelevant and immaterial to any issue.

The Court: Read the question.

(The last question is read by the reporter.)

The Court: They might be permitted in every other kind of a situation as to every other traveler traveling under circumstances like this one, but this one might not have been. Why is it material, Mr. Cushman?

Mr. Cushman: Well, your Honor, the only issue in this case is the scope of employment, and unless we are able to show what you would call in the

(Testimony of Joseph John Cichy.)

normal case the practices and usages of the trade, we are limited in trying to show the control.

The Court: Have you any plea in your answer of an issue which raises the question that under the practices of the military profession things are done which are not ordinarily done, that is to say something that is material to this action?

Mr. Cushman: Well, your Honor, we have denied that he is within the scope of his employment.

The Court: You should have plead the custom, The custom must be pleaded. The objection is sustained. Proceed with something else. The Court will [19] restrict cross-examination soon if there is not some indication that it can be moved on more expeditiously.

Mr. Cushman: I believe that is all.

Mr. Toulouse: That is all.

The Court: Step down.

(Witness excused.) [20]

## ORAL DECISION

The Court: From a preponderance of the evidence in this case, the Court finds, concludes and decides that so far as liability is concerned, Sergeant Mayer at the time of the accident alleged in plaintiff's complaint was acting in the course of his employment as a person engaged in the military business of the Armed Forces of the United States, and the acts done by him in deriving said car at said time were within the scope of his authority;

That at the time and place of the accident complained of in this plaintiff's complaint, Staff Sergeant Mayer was in fact just as much in pursuit of his employer's business on the trip in his car to his militarily assigned post to advance his education of value to the military forces as if instead of being where he was at the time and place of this accident and instead of using his car for the business he then was using it, he had then been assigned to duty on the Seattle waterfront to advance his education in the Chinese language to be used in his military work, and if in the course of that educational activity, during the hours of his daily duty, he had, with permission and under circumstances like [21] those here, been using his automobile and had been required to go from one dock to another and after interviewing one Chinese language teacher on board one vessel at one dock he had used such automobile to go to the other dock to interview some other Chinese language teacher on board a ship at the other dock, and if in using this automobile in that transaction an accident had happened under conditions like those in this case proximately resulting in injuries and damages to plaintiff like those here;

That since with the permission of the Government Sergeant Mayer was here using his car to transport himself while on such Government business at the time and place of the accident, he necessarily must be regarded in law as being the operator of the transportation vehicle whether it was his own automobile or a Government automobile. Such auto-

mobile was just as much on Government business at the time and place of the accident as was the Government employee, Staff Sergeant Mayer;

That under the law of the State of Washington, in which state the accident happened, a private employer of one of its employees would be liable for the negligent injury of another by such employee under [22] circumstances like those here involved and which proximately caused the injuries and damages in this action complained of by plaintiff at least to the extent hereinafter specifically found and approved by the Court;

That at the time of commencing this action the plaintiff was a resident, as in his original complaint alleged, of King County, Washington; that this Court does have jurisdiction of this cause; and that all of the material matters and things alleged in paragraphs II, III, IV, V and VI are established by a preponderance of the evidence in this case, except as to the loss of earnings stated in paragraph VI, subparagraph (3), and except the total sum of damages stated in line 9 on page 4 of the amended complaint; that as to these paragraphs specifically mentioned just now, namely, II, III, IV, V and VI, the Court refers to those appearing in plaintiff's amended complaint filed herein December 27, 1954;

That plaintiff has been injured and damaged as a proximate cause of the matters and things aforesaid resulting proximately from the negligence of the defendant's Armed Forces employee, Staff Sergeant Richard E. Mayer, as alleged in plaintiff's complaint [23] in the total sum of \$3,250.00 on

account of all the matters and things in plaintiff's complaint alleged, including all special and general damages and all other causes of action and items of claim of every name and nature stated in such complaint or complaints.

Is there any other issue tendered by the pleadings not covered by the Court's announced decision?

Mr. Toulouse: Only one thing. I am not sure, your Honor, but does that cover the damage to the car, the \$2,350.00, that is the \$1,381.00?

The Court: No, it does not.

Except that in addition to the foregoing, the Court does award to plaintiff the further sum of \$1,818.81 as special damages to plaintiff's car, which sum is in addition to the said sum of \$3,250.00.

Mr. Toulouse: Your Honor, there is only one other point. Under the Federal Tort Claims Act, the allowance of attorneys' fees is limited to twenty per cent.

The Court: I would like to ask, Mr. Toulouse, do you still claim 20% of the recovery under the statute?

Mr. Toulouse: We request 20% of the [24] award.

The Court: I ask, Mr. Kennedy, do you have any objection to the Court allowing out of this recovery awarded to the plaintiff 20% for your attorneys' fees as the law permits the Court in its discretion to do if the Court is convinced that the services are of that value? Do you wish to advise the Court on this occasion as to whether you ap-

prove of the Court's awarding to Mr. Toulouse and deducting from the foregoing amounts allowed to you 20% of all such amounts you are to receive as and for his attorneys' fees? If you have not finally discussed the matter with Mr. Toulouse, you are at liberty to do so now before you decide.

Have you considered the matter?

Mr. Kennedy: Yes, I have.

The Court: What is your attitude?

Mr. Kennedy: In agreement.

The Court: Do you approve of his receiving 20% of the recovery?

Mr. Kennedy: Yes, sir.

The Court: That will make your take-home recovery, so to speak, 20% less than it would be if you did not have to pay your attorney. Do you understand that?

Mr. Kennedy: Yes, sir. [25]

The Court: And you approve the Court allowing 20%, do you, to your attorney?

Mr. Kennedy: Yes, sir.

The Court: Then the Court does find that such sum of 20% is a reasonable sum to be allowed plaintiff's attorneys as and for plaintiff's attorneys' fees in this case and that said sum may be paid to the plaintiff's attorneys out of the said over-all award just announced by the Court.

Mr. Toulouse: When would you like findings of fact and conclusions of law to be submitted, your Honor?

(Whereupon discussion was had relative to

the setting of a date for the above-mentioned purpose.)

The Court: The matter is continued until 2:00 o'clock p.m. on Thursday afternoon, December 30th, for the purpose mentioned. [26]

Certificate

I, Frances I. Gilligan, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ FRANCES I. GILLIGAN,  
Official Court Reporter.

[Endorsed]: Filed April 18, 1955. [27]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT  
COURT, TO RECORD ON APPEAL

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) of the Federal Rules of Civil Procedure I am transmitting herewith as the record on appeal

in said cause, all of the original documents in the file dealing with the above cause, same being the record on appeal from the judgment filed and entered Dec. 30, 1954, in behalf of plaintiff, said papers being identified as follows:

1. Complaint, filed Apr. 16, 1954.
2. Marshal's Return on Summons, filed Apr. 22, 1954.
3. Appearance of Defendant, filed May 6, 1954.
4. Answer, filed June 23, 1954.
5. Memorandum in Support of Motion to Dismiss, filed Dec. 27, 1954.
6. Amended Complaint, filed Dec. 27, 1954.
7. Praecipe for Subpoena, Dr. S. J. Vukov, filed Dec. 27, 1954.
8. Answer to Amended Complaint, filed Dec. 28, 1954.
9. Plaintiff's Memorandum Brief, filed Dec. 28, 1954.
10. Marshal's Return on Subpoena, Vukov, filed Dec. 29, 1954.
11. Findings of Fact and Conclusions of Law, filed Dec. 30, 1954.
12. Judgment, filed Dec. 30, 1954.
13. Notice of Appeal, filed Feb. 24, 1955.
14. Motion Deft. to Extend Time for Docketing Appeal, filed March 24, 1955.
15. Order Extending Time for Docketing Record on Appeal to May 1, 1955, inclusive, filed March 24, 1955.
16. Court Reporter's Transcript of Testimony



of Joseph John Cichy, and Oral Decision by the Court, filed April 18, 1955.

17. Order Extending Time for Docketing Record on Appeal to 5/22/55, filed April 27, 1955.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, \$5.00; and that said amount has not been paid to me because the appeal herein is being prosecuted by the United States of America.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 16th day of May, 1955.

[Seal]                      MILLARD P. THOMAS,  
Clerk;

By /s/ TRUMAN EGGER,  
Chief Deputy.

---

[Endorsed]: No. 14767. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Harold Kennedy, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 17, 1955.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit

No. 14767

UNITED STATES OF AMERICA,

Appellant,

vs.

HAROLD KENNEDY,

Appellee.

STATEMENT OF APPELLANT'S POINTS  
ON APPEAL

On appeal herein to the United States Court of Appeals for the Ninth Circuit, appellant United States of America, relies on the following points:

1. The District Court erred in holding that Staff Sergeant Richard E. Mayer was acting in the line of duty and within the scope of his employment at the time of the accident in question.

2. The District Court erred in ruling that the United States of America could at all times control Staff Sergeant Mayer in his actions in the same manner that a private employer might have control over him had he been in the employ of such an employer.

3. The District Court erred in failing to hold that as a matter of law Sergeant Mayer was acting outside the scope of his employment inasmuch as he had not been directed by the United States to travel by his own automobile.

4. The District Court erred in failing to hold that as a matter of law Sergeant Mayer was acting outside the scope of his employment inasmuch as the use of his own automobile was for his personal convenience and not for that of the Government.

5. The District Court erred in concluding that the law of the State of Washington was relevant on the question of whether Staff Sergeant Mayer was acting within the scope of his employment.

6. The District Court erred in concluding that plaintiff was entitled to judgment against the United States.

/s/ CHARLES P. MORIARTY,  
United States Attorney;

/s/ F. N. CUSHMAN,  
Assistant U. S. Attorney;

PAUL A. SWEENEY,  
Chief, Appellate Section, Civil Division, Department of Justice.

[Endorsed]: Filed May 20, 1955.



No. 14767

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**In the United States Court of Appeals  
for the Ninth Circuit**

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**UNITED STATES OF AMERICA, APPELLANT**

**v.**

**HAROLD KENNEDY, APPELLEE**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN  
DIVISION**

---

**BRIEF FOR APPELLANT**

---

**WARREN E. BURGER,**

*Assistant Attorney General,*

**CHARLES P. MORIARTY,**

*United States Attorney,*

**PAUL A. SWEENEY,**

**JULIAN H. SINGMAN,**

*Attorneys,*

*Department of Justice.*

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**FILED**

**SEP 12 1955**

**PAUL R. O'BRIEN, CLERK**



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# **In the United States Court of Appeals for the Ninth Circuit**

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**No. 14767**

**UNITED STATES OF AMERICA, APPELLANT**

*v.*

**HAROLD KENNEDY, APPELLEE**

---

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN  
DIVISION**

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**BRIEF FOR APPELLANT**

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## **JURISDICTIONAL STATEMENT**

By judgment entered December 30, 1954, the District Court in this case held the United States liable under the Federal Tort Claims Act, 28 U. S. C. 1346 (b), 2671 *et seq.*, for damages suffered by appellee in an automobile collision caused by the negligence of a soldier who was on leave and was driving his own car (R. 3-6, 8-13). The District Court rejected the Government's defense that at the time of the accident the soldier was not acting within the scope of his employment (R. 7, 13-20) and entered judgment for plaintiff-appellee for \$4,568.81 plus interest and costs (R. 54). The United States filed

notice of appeal on February 24, 1955 (R. 56). This Court's jurisdiction rests on 28 U. S. C. 1291.

#### STATEMENT OF THE CASE

On January 5, 1954 Post Headquarters at Fort Lewis, Washington, issued special orders relieving Sergeant First Class Richard E. Mayer of his assignment at that post effective January 14, 1954, and assigning him to duty at the Army Language School in the Presidio of Monterey, California, about one thousand miles south of Fort Lewis (R. 48-9). Sergeant Mayer was not required to report to the school until midnight January 28, 1954 and was authorized in the meantime to take ten days leave at his home point, Seattle, Washington, which is about 47 miles north of Fort Lewis, followed by four days time to travel the distance between Fort Lewis and the Presidio (R. 14-15, 63, 73).

The orders also offered Mayer the option of traveling to the Presidio by common carrier, to be selected by the Transportation Corps, or of securing his own means of transportation, including the use of a private vehicle if he so desired, in which case he was to be reimbursed according to the allowances authorized by the Joint Travel Regulations (Pars. 4150-1, 4151) for the cost of traveling between Fort Lewis and the Presidio, but not for travel between Fort Lewis and Seattle (R. 14, 72-3). For his personal convenience, Sergeant Mayer chose to use his own car, a four-year old Ford (R. 50).

On the morning of January 23, 1954, before the expiration of his ten days leave and five and a half

days before he was due to report to the Presidio of Monterey, Sergeant Mayer was driving his own car south on U. S. Highway 99, a four lane road, between Seattle and Tacoma, Washington (R. 51).<sup>1</sup> At a point about ten and one-half miles south of Seattle,<sup>2</sup> Mayer's car, traveling in the inside southbound lane after having just passed a truck, skidded on an icy patch in the road. The car slid across the center of the highway into the inside northbound lane where it was struck by a car driven by appellee. Both drivers were injured and hospitalized as a result of the accident.

Appellee brought suit against the United States on April 16, 1954, seeking damages for the loss of his car, personal injuries and other property damage (R. 3-6). The Government moved to dismiss the complaint upon the ground that Sergeant Mayer was not acting within the scope of his employment or in the line of duty at the time of the accident, but the court below took no action on that motion (R. 13). At the conclusion of the trial, held in December 1954, the trial judge rendered an oral opinion that "Sergeant Mayer at the time of the accident alleged in plaintiff's complaint was acting in the course of his employment as a person engaged in the military business of the Armed Forces of the United States, and the acts done by him in driving said car at said time were within

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<sup>1</sup> Tacoma is about 30 miles south of Seattle and en route between Seattle and Fort Lewis.

<sup>2</sup> At this point Sergeant Mayer was about 36 miles north of Fort Lewis and therefore had not yet begun traveling on the Fort Lewis-Monterey trip for which he was to be reimbursed by the Army.

the scope of his authority" (R. 74). This ruling was based upon the finding that—

\* \* \* since with the permission of the Government Sergeant Mayer was here using his car to transport himself while on such Government business at the time and place of the accident, he necessarily must be regarded in law as being the operator of the transportation vehicle whether it was his own automobile or a Government automobile. Such automobile was just as much on Government business at the time and place of the accident as was the Government employee, Staff Sergeant Mayer (R. 75-6).

On December 20, 1954 the court entered judgment in favor of the plaintiff in the amount of \$4,568.81 plus interest and costs (R. 54).

#### SPECIFICATIONS OF ERROR RELIED UPON

1. The District Court erred in holding that Sergeant First Class Richard E. Mayer was acting in the line of duty and within the scope of his employment at the time of the accident in question.

2. The District Court erred in ruling that the United States of America could at all times control Sergeant Mayer in his actions in the same manner that a private employer might have control over him had he been in the employ of such an employer.

3. The District Court erred in failing to hold that as a matter of law Sergeant Mayer was acting outside the scope of his employment inasmuch as he had not been directed by the United States to travel by his own automobile.

4. The District Court erred in failing to hold that as a matter of law Sergeant Mayer was acting outside the scope of his employment inasmuch as the use of his own automobile was for his personal convenience and not for that of the Government.

5. The District Court erred in concluding that the law of the State of Washington was relevant on the question of whether Sergeant Mayer was acting within the scope of his employment.

6. The District Court erred in concluding that plaintiff was entitled to judgment against the United States.

#### STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Federal Tort Claims Act and of the Joint Travel Regulations are set forth in the Appendix, *infra*, pp. 30-32.

#### INTRODUCTION AND SUMMARY OF ARGUMENT

### I

In its oral decision, the court below ruled that the United States is liable for the negligent driving of Sergeant Mayer because "the acts done by him in driving [his] car at [the time of accident] were within the scope of his authority" (R. 74). Again, in Finding of Fact III the court found that Mayer "was making that trip within the scope of his authority" (R. 50). In our view, the court below misconceived the issue in this case. The issue, we submit, is whether Mayer was acting within the *scope of his employment* at the time and place of the accident, and, under the applicable federal court decisions, this would depend

upon whether the Government could control Mayer in the performance of the act he committed and whether he was then acting to further the Government's interests, not whether he was *authorized* to do what he was doing. Of course an employer can authorize the use of an automobile without assuming liability for its negligent operation.

In effect Mayer's orders stated that if he preferred, the Transportation Corps would arrange for his travel, would provide meal tickets, and would assume full responsibility for ensuring that he reached the Presidio on time; but if he so chose he would be permitted to arrange for his own transportation, without any supervision whatever, and would be reimbursed for the travel. By permitting Mayer to adopt the second alternative, the United States relinquished all control over the details of his transportation on this "change of station." It could neither control the safety of the vehicle used nor control or supervise Mayer's driving.

Furthermore, since Sergeant Mayer chose to drive his automobile for his personal convenience and not for the convenience of the Government, and because he was on leave at the time of the accident, he was not acting in furtherance of the Government's interests. His assigned duties did not encompass the driving of a car and he was not ordered to do so. It was of no concern to the Government what mode of transportation Mayer used to get to his new assignment, and it was certainly not in the interest of the Government for Sergeant Mayer to be driving his automobile at a point north of Fort Lewis when his new assignment was one thousand miles south of Fort Lewis.



## II

Our contention is that it is well established that the Government's liability under the Federal Tort Claims Act is measured by the same standard whether the employee be a civilian or a serviceman and that this liability depends upon whether the tortfeasor-employee committed the tortious act within the scope of his employment. In our view this Court agreed with that position in *Williams v. United States*, 215 F. 2d 800 (1954).<sup>\*</sup> For that reason, in the first part of our brief we analyze the facts of this case in terms of the traditional common law doctrine of *respondeat superior*. However there is language in the *Williams* opinion that could be interpreted as establishing a separate, more limited standard of liability for the torts of servicemen. But this language in the *Williams* opinion need not be amplified at this time because even under the broader *respondeat superior* standard of liability the United States would not be liable, and we are content to rest on that standard.

## ARGUMENT

**I. The United States is not liable under the respondeat superior doctrine for Sergeant Mayer's negligence.**

Whether or not particular conduct of an employee is within the scope of his employment so as to impose vicarious liability upon his employer may depend upon numerous factors (see *Restatement, Agency* § 229 (1933); see also *Standard Oil Company v.*

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<sup>\*</sup>The Supreme Court granted certiorari in the *Williams* case on January 31, 1955.

*Anderson*, 212 U. S. 215 (1909)), but there are certain irreducible elements without which liability cannot attach under the doctrine of *respondeat superior*, and it is these elements which were not established in this case.

It is familiar law that the test for application of the *respondeat superior* doctrine is that the master-servant relationship must be shown to exist at the time of the injury and with respect to the very transaction out of which the injury arose. *Brailas v. Shepard S. S. Co.*, 152 F. 2d 849, 850 (C. A. 2, 1945), certiorari denied, 327 U. S. 807 (1946); *Lamb v. Interstate S. S. Co.*, 149 F. 2d 914, 917 (C. A. 6, 1945); *Mid-Continent Pipe Line Co. v. Whitely*, 116 F. 2d 871, 875 (C. A. 10, 1940). That relationship, in turn, can be shown to exist only where (1) the employer has the right and power to direct and control the employee in the performance of the negligent act or omission which caused the injury; and (2) where the employee was engaged on the employer's business when the tort occurred. *Standard Oil Co. v. Anderson*, 212 U. S. 215, 221 (1909); *Moye v. United States*, 218 F. 2d 81 (C. A. 5, 1955); *United States v. Sharpe*, 189 F. 2d 239 (C. A. 4, 1951); *United States v. Eleazer*, 177 F. 2d 914 (C. A. 4, 1949), certiorari denied, 339 U. S. 903 (1950); *Craige v. Austin Powder Co.*, 91 F. 2d 664 (C. A. 4, 1937); *P. F. Collier & Son Co. v. Hartfeil*, 72 F. 2d 625 (C. A. 8, 1934); *Phelps v. Boone*, 67 F. 2d 574 (C. A. D. C., 1933), certiorari denied, 291 U. S. 677 (1934); *Standard Oil Co. v. Parkinson*, 152 Fed. 681, 682

(C. A. 8, 1907); *Brady v. Chicago & G. W. Ry. Co.*, 114 Fed. 100 (C. A. 8, 1902).<sup>3</sup>

Although to avoid liability it may not be necessary for the United States to show that Sergeant Mayer was not acting within the "scope of his employment" when driving his car on the road to Tacoma, but only that he was not acting in "line of military duty," nevertheless we believe that even under the broad principles making employers liable for torts of civilian employees the United States cannot be held responsible for Sergeant Mayer's negligence because neither of the two elements necessary to establish the *respondeat superior* relationship are present here.

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<sup>3</sup> Federal law is the applicable law for determining whether Sergeant Mayer was acting within the scope of his employment or in the line of duty, *Williams v. United States*, 215 F. 2d 800 (C. A. 9, 1954); but even if Washington law were applicable, the same general principles of *respondeat superior* would apply. *Roletto v. Department Stores Garage Co.*, 30 Wash. 2d 439, 442, 191 P. 2d 875, 877 (1948); *Miles v. Pound Motor Co.*, 10 Wash. 2d 492, 117 P. 2d 179 (1941); *MacGrail v. Department of Labor and Industries*, 190 Wash. 272, 277, 67 P. 2d 851, 853 (1937); *Leech v. Sultan R. & Timber Co.*, 161 Wash. 426, 427, 297 Pac. 203, 204 (1931). The result would therefore not be different.

In a case somewhat similar to this one, *Gray v. Department of Labor & Industries*, 43 Wash. 2d 578, 262 P. 2d 533 (1953), the Supreme Court of Washington held, for purposes of workmen's compensation (where scope of employment is liberally construed because of the usual presumption in favor of workmen), that an employee was not on her employer's business, and therefore not operating within the scope of her employment when she, while using her employer's vehicle with his permission, was returning to work from a personal excursion. In that case, as here, the claimant was returning to work from her personal mission.

A. The Government neither exercised nor did it have the right to exercise the type of supervision and control which would give rise to respondeat superior liability for Sergeant Mayer's negligent act.

In the absence of the right or power in the employer to command or direct the employee in the performance of the act or omission charged, there can be no recovery under *respondeat superior* "because in such a case there is no superior to respond." *United States v. Eleazer*, 177 F. 2d 914, 917 (C. A. 4, 1949). This lack of control has, with respect to the very type of situation here presented, been consistently viewed as requiring a holding of non-liability on the part of the employer.

In the *Eleazer* case, *supra*, the Fourth Circuit held the United States not liable for the tort of a serviceman in circumstances very similar to those of this case. There, as here, the serviceman at the time of the accident was driving his own automobile pursuant to orders permanently changing his station but allowing him to take leave en route to the new station. In holding that the Government did not have sufficient control of the operations of the automobile to warrant its being held liable under the doctrine of *respondeat superior* the court quoted from § 239 of the *Restatement of Agency* (comment b) as follows:

The fact that the instrumentality used by the servant is not owned by the master is a fact which may indicate that the use of the instrumentality is not authorized, or if authorized, that its use is not within the scope of employment. *The master may authorize the use of a particular instrumentality without assuming control over its use as a master.* The fact that

he does not own it or has not rented it upon such terms that he can direct the manner in which it may be used indicates that the servant is to have a free hand in its use. If so, its control by the servant, *although upon his master's business*, is not within the scope of the employment. [177 F. 2d at 917. Emphasis supplied.]

The court also quoted from Illustration No. 4 under that section:

\* \* \* In going to a place at which he is to perform work for the master A drives his own car, carrying thereon necessary tools and materials belonging to the master. *In the absence of evidence that A owes P (the employer) any duty of obedience in the details of operating the automobile, such driving is not within the scope of employment.*" [Ibid.]

This *Restatement* rule has also been applied in *Reiling v. Missouri Ins. Co.*, 236 Mo. App. 164, 178, 153 S. W. 2d 79, 86 (1941); *Blackman v. Atlantic City, &c. R. R.*, 126 N. J. L. 458, 462, 19 A. 2d 807, 808 (1941); *Holdsworth v. Penna. P. and L. Co.*, 337 Pa. 235, 241, 10 A. 2d 412 (1940); and *Khoury v. Edison Electric Illum'g Co.*, 265 Mass. 236, 164 N. E. 77 (1928). See also *Jozwiak v. United States*, 123 F. Supp. 65 (S. D. Ohio, 1954); *Ellis v. Service Co., Inc.*, 240 N. C. 453, 82 S. E. 2d 419 (1954); *Reardon v. Coleman Bros., Inc.*, 277 Mass. 319, 178 N. E. 638 (1931). In the *Khoury* case, cited in the *Eleazer* opinion, an electric company's regular employee negligently operated his own car while en route to install a flood light for the electric company in another city.

The company had not required nor requested the employee to use his car on its business but had merely agreed that if he used it he would be paid the equivalent of what he would otherwise be required to pay for railroad fares. The Massachusetts Judicial Court, noting that the company had no right to control the means and details of the transportation, which had been left entirely to the employee, decided that the company could not be held liable for his negligent operation of his automobile.

A recent opinion by Chief Judge Magruder in *Conversion & Surveys v. Roach*, 204 F. 2d 499 (C. A. 1, 1953), reiterates this rule. The basic question in that case, as here, was whether the employer could be held liable under *respondeat superior* for the employee's negligent operation of his privately owned car. In holding that there was no liability, Judge Magruder noted that there was no "evidence warranting the inference that the owner, while permissively using his car on company business, has yielded up to his employer this right to control speed, route and other details of operation." 204 F. 2d 499, 501. See also the Fifth Circuit's recent holding, per Chief Judge Hutcheson, that the United States, in a Federal Tort Claims Act suit, cannot be held liable under *respondeat superior*, "Where, as here, the car is the private car of the employee" and "no control whatever" is assumed by the United States. *Moye v. United States*, 218 F. 2d 81, 83 (C. A. 5, 1955).

Applying this settled rule to the facts in the instant case there can be no question that the United States at no time assumed or retained any right to control

any of the details of Sergeant Mayer's trip. Indeed, since Mayer was on leave at the time of the accident<sup>4</sup> and was therefore "at liberty to go where he will,"<sup>5</sup> the United States could not have controlled the details of his trip. The Government, having ordered Sergeant Mayer to report to the Presidio, could have provided for his transfer thereto (1) by arranging directly with a common carrier to transport Sergeant Mayer to his new post; or (2) by permitting Sergeant Mayer to take care of the transportation problem himself in consideration of his being paid a certain mileage allowance computed over the shortest usually travelled route between his old and new station. § 303, Act of October 12, 1949, 63 Stat. 813, 37 U. S. C. 253; *Joint Travel Regulations*, Pars. 4150-4157 (1947).

In this case, Sergeant Mayer's orders gave him the option of choosing either alternative. He chose the second, and further decided to use his own car rather than to go by plane, train or bus. The United States thus was not called upon to provide or arrange for his transportation. Neither did the United States even purport to exercise any supervision or control over the trip or over his driving. Since Mayer elected to use his private car, he alone determined the route of the trip; he alone, in his private capacity, con-

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<sup>4</sup> By terms of the order, Sergeant Mayer was relieved of his assignment at Fort Lewis effective January 14, 1954. He was given ten days leave beginning on that date (R. 14). His orders therefore did not become effective until January 24, 1955, the day following the accident. *Joint Travel Regulations*, Par. 3003-1b (1947).

<sup>5</sup> *United States v. Williamson*, 90 U. S. (23 Wall.) 411, 415 (1874).

trolled the type of car he drove, the condition of its repair, the effectiveness of its horn and brakes, the safety of its tires, and the condition of its lights, steering gear and other vital equipment.<sup>6</sup> It was Mayer who planned the entire performance of this transportation job, who made all the necessary inspections as to the safety of his privately owned car and who had the final say and full control over its mechanical fitness.

Further, it was for Mayer alone to decide how fast to drive his own car upon the icy road, when it was safe to pass the truck in front of him, when the brakes should be applied and how to prevent or ameliorate skidding. He was subject to no military instructions or directions in that respect. Indeed, the record does not even show whether Mayer held a Government driver's license.<sup>7</sup> Certainly he was not asked to show a license before leaving Fort Lewis in his own car.

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<sup>6</sup> By contrast compare the control which the United States exercises over maintenance and operation of its own motor vehicles. Army Regulation 700-105, Sections III and IV. Paragraph 19 of that Regulation makes commanding officers responsible for the proper operation of all Army vehicles under their supervision and for the performance of appropriate maintenance procedures according to the applicable Technical Manual. A separate provision prohibits the use of vehicles not in safe operating condition. Paragraph 26. Moreover, Paragraph 30 of AR 700-105 prohibits the hiring of any non-Army vehicle for more than 48 hours without prior approval of the Department of the Army. Paragraphs 33 and 34 of the Regulation deal with required inspections to be supervised by commanding officers to insure proper maintenance and compliance with regulatory standards.

<sup>7</sup> Paragraph 22 of AR 700-105 sets forth elaborate standards for testing of, and granting permits to, drivers of Army vehicles.



In short, the *only* duty the United States had in connection with Mayer's trip was that it was to pay him a travel allowance for the trip between Fort Lewis and the Presidio of Monterey, but as the Fourth Circuit said in *United States v. Eleazer*, 177 F. 2d 914, 917 (1949), certiorari denied, 339 U. S. 903 (1950):

\* \* \* the fact that the government was to pay him mileage to Corpus Christi is no more reason for imposing liability on it for his negligent driving than for imposing liability for the negligence of a railroad company or the pilot of an airplane, if he had chosen to make the trip by rail or by air.

Accordingly there is no justification for concluding that Sergeant Mayer, when driving the car involved in the accident, was then subject to the control or the right of control of the United States with respect to his conduct in the performance of his transportation duties. To the contrary, the facts demonstrate that at the time of the accident he was about as free from Army control as any man could be who was still a member of the armed forces.<sup>8</sup>

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<sup>8</sup> Technically, Mayer's true position with respect to the United States was much like that of an "independent contractor." See *Craige v. Austin Powder Co.*, 91 F. 2d 664 (C. A. 4, 1937); *Khoury v. Edison Elec. Illum'g Co.*, 265 Mass. 236, 164 N. E. 77 (1928); *Holdsworth v. Penna P. & L. Co.*, 337 Pa. 235, 10 Atl. (2d) 412 (1940); *Leech v. Sultan R. & Timber Co.*, 161 Wash. 426, 297 Pac. 203 (1931); *Larson v. American Bridge Co.*, 40 Wash. 224, 82 Pac. 294 (1905).

**B. Sergeant Mayer was not on Government business at the time of the accident.**

Despite the District Court's conclusion to the contrary, that court's findings of fact plainly establish that Sergeant Mayer was not acting in furtherance of the Government's business at the time of the accident. Those findings show that before the accident Sergeant Mayer had received orders detaching him from his assignment at Fort Lewis, Washington, and directing him to report at a later date for duty at the Presidio of Monterey, California; that the orders also permitted him, before reporting to his new post, to take leave at Seattle, Washington, in the opposite direction from Monterey; that Mayer, driving his own car, collided with appellee at a point between Seattle and Fort Lewis before Mayer had reached the starting point for that part of the trip for which he was to be reimbursed; and that the accident occurred before the expiration of Mayer's ten days' leave. These facts, we submit, permit no conclusion other than that Sergeant Mayer was not engaged in Government business at the time of the accident.

1. *The mode of transportation used by Mayer was a matter of indifference to the United States.* Although the United States directed Mayer to report to his new station in Monterey and authorized transportation to that new station, once Mayer had chosen to provide his own means of transportation the United States was relieved of any concern with the mode of travel used. It was a matter of complete indifference to the United States whether Mayer traveled by air, rail or road. Its only concern was that he report to

the Army Language School by midnight of January 28, 1954. Otherwise he was completely free to do what he pleased. Mayer was not directed to use his own car, nor was it essential to the discharge of his duties under travel orders for him to travel in his own car. "When he chose to drive his own car, instead of availing himself of commercial transportation, he was acting in furtherance of his own purposes, not those of the Government; and his action in driving the car cannot reasonably be said to have been action taken within the scope of his employment or office." *United States v. Eleazer*, 177 F. 2d 914, 916 (C. A. 4, 1949), certiorari denied 339 U. S. 903 (1950). Also, see *Murphy v. United States*, 113 F. Supp. 345 (W. D. N. Y., 1953), where the court held a soldier not to be acting on Government business when driving his own car to his duty assignment from his quarters off post.

In a case much like this one the Fourth Circuit was faced with the question of whether a serviceman using his own automobile for travel to an assigned duty station was acting within the scope of his employment for purposes of the Federal Tort Claims Act. *Paly v. United States*, — F. 2d — (C. A. 4, 1955), affirming 125 F. Supp. 798 (D. Md., 1954); see R. 21-45. In the *Paly* case a sailor was ordered to accompany the remains of a fellow sailor, who had died in service, from the Patuxent River Base in Maryland to Baltimore and to attend the funeral there as a courtesy of the United States. The sailor chose to use his own car for the trip (the remains of

the deceased sailor having been sent to Baltimore previously) for which he would be reimbursed in accordance with general authorized practice in such matters (R. 26). Although the serviceman was not on leave, as Mayer was here, but was traveling to Baltimore to perform an official function, the District Court held that the United States was not liable for the sailor's negligent driving because he took his own car for his own convenience when he could have traveled by common carrier or could have requested official transportation (R. 42). The Fourth Circuit affirmed in a brief *per curiam* opinion.

2. *A soldier on leave is not engaged in the business of the United States.* The Supreme Court has stated that while on leave a soldier is "at liberty to go where he will during the permitted absence, to employ his time as he pleases and to surrender his leave as he chooses." *United States v. Williamson*, 90 U. S. (23 Wall.) 411, 415 (1874). The leave is a favor "granted for his sole accommodation" to permit him to "enjoy a respite from military duty." *Foster v. United States*, 43 C. Cls. 170, 175 (1908). "A leave of absence or a furlough is a favor extended. A soldier can not have a furlough forced upon him." *Hunt v. United States*, 38 C. Cls. 704, 710 (1903).

The mere fact that a serviceman is on leave with his commander's approval plainly cannot be deemed to convert a purely voluntary undertaking for the serviceman's personal accommodation into the performance of business for the United States. If this accident had occurred when Mayer was traveling under orders granting him permission to take ordinary leave

and was returning to his duty station at Fort Lewis when the accident occurred, it is clear that the United States would not have been liable. See, *e. g.*, *Bach v. United States*, 92 F. Supp. 715 (S. D. N. Y., 1950) (Ensign returning to duty from weekend leave and driving own car held not on Government business). Here, the only difference is that Mayer was under orders to return to duty at the Presidio of Monterey, rather than at Fort Lewis.

Nor does the fact that Sergeant Mayer had been directed to report to Monterey by a certain date make a trip to his home official business of the United States. Regardless of what his relationship to the United States might have been had he been proceeding directly from Fort Lewis to Monterey in compliance with his travel orders,<sup>9</sup> it is clear that he was not, at the time of the accident, so proceeding. At that time he was, for his personal convenience, voluntarily taking advantage of permission to take leave in Seattle. The leave of absence suspended the effective date of his detachment from Fort Lewis, and it was only at the expiration of the leave that Sergeant Mayer came under operation of the order. *Joint Travel Regulations*, Par. 3003-1b (1947).

Thus, contrary to the conclusion of the court below, Mayer was not traveling "pursuant to" the order but was simply taking advantage of the leave privilege

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<sup>9</sup> As we have shown above, pp. 12-15, even if Mayer had been on Government business, for the purpose of otherwise imposing liability under *respondeat superior*, the United States would not have been liable because it had no control over his driving or other details of the transportation.

extended by the order for his personal benefit and accommodation. The Government is not interested in how a serviceman employs his time during his leave. See 16 Comp. Dec. 611, 616. The Government can no more be held liable for Mayer's negligence in the operation of his own car than it could be for his negligence in any other activity in which he engaged during his leave.

Finally, the fact that the order stated that this travel is deemed necessary (TDN), as emphasized in the direct examination of Warrant Officer Cichy (R. 60-62), does not justify categorizing the act of driving Mayer's personally owned automobile from Fort Lewis to the Presidio as the furtherance of his employer's official business; even less does it justify the bringing of Mayer's purely personal trip from Fort Lewis to Seattle and back to Fort Lewis within the same category. The travel required by the order was between Fort Lewis and the Presidio of Monterey and, with respect to such official travel *between the two posts*, the language used by the order merely reflects the statutory conditions that mileage allowance for military men is payable only for travel on "public business." Act of June 30, 1876, 19 Stat. 65; Act of March 8, 1883, 22 Stat. 406, 10 U. S. C. 747; Act of March 6, 1894, 28 Stat. 237, 10 U. S. C. 759; Rev. Stat. 1612, 34 U. S. C. 971; *Perrimond v. United States*, 19 C. Cls. 509 (1884). But persons traveling on "public business" for purposes of reimbursement of travel expenses are not necessarily acting within the scope of their employment, nor, in fact, are they necessarily even employees of the United States. The Govern-

ment is authorized in many instances to pay mileage allowances to individuals never in its employ or to those whose employment with it has been finally terminated.<sup>10</sup>

Moreover the other facts emphasized above—that the Government had no interest in the means Mayer used to reach the Presidio, that driving his own automobile was not within the general scope of the duties to which Mayer had been assigned, that at the time of the accident he was on leave, and that the accident occurred between Seattle and Fort Lewis, at a point in the opposite direction from that in which Mayer would have been heading had he been going to his next station—conclusively show that at the time of the accident here involved Mayer was not engaged in Government business and was not furthering the Government's interests.

**II. The respondeat superior standard of liability is the only standard applicable under the Federal Tort Claims Act whether the tortfeasor-employee be civilian or serviceman.**

The Federal Tort Claims Act permits suit against the United States only within the limits of the doctrine of *respondeat superior*; i. e., only where the tortious act of an employee was committed within the

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<sup>10</sup> Act of August 2, 1946, 60 Stat. 855, 37 U. S. C. 117a-1 (mileage allowance for cadet candidates traveling to the Academy to take examinations); 28 U. S. C. 1821 (mileage allowance for witness' travel to and from court); Act of March 14, 1940, 54 Stat. 49, 38 U. S. C. 76 (mileage allowance for veterans traveling to and from Veterans Administration hospitals for examinations or treatment); *Baylis v. United States*, 79 C. Cls. 486 (1934) (even though travel performed after effective date of retirement, officer entitled to mileage allowance).

scope of his employment. As explained by the Court of Appeals for the Fifth Circuit, "The whole structure and content of the Federal Tort Claims Act makes it crystal clear that in enacting it and thus subjecting the Government to suit in tort, the Congress was undertaking with the greatest precision to measure and limit the liability of the Government under the doctrine of respondeat superior." *United States v. Campbell*, 172 F. 2d 500, 503 (C. A. 5, 1949), certiorari denied, 337 U. S. 957 (1949); also quoted in *Williams v. United States*, 215 F. 2d 800, 809 (C. A. 9, 1954); *United States v. Eleazer*, 177 F. 2d 914, 918 (C. A. 4, 1949), certiorari denied, 339 U. S. 903 (1950); cf. *Christian v. United States*, 184 F. 2d 523 (C. A. 6, 1950).

Under the Act, the liability of the United States is expressly limited to the negligence of any employee occurring while the employee was acting "within the scope of his office or employment" (28 U. S. C. 1346 (b)). Further, the Act limits the Government's liability to that which "a private individual" would have "in like circumstances" (28 U. S. C. 1346 (b), 2674). Generally, there is, of course, no vicarious liability of a private person for the tort of an employee except when the employee acted within the scope of his employment.

Although we believe this principle to be well-settled and have assumed its truth in analyzing the facts in this case, the contention has been made that a different standard of liability must be applied when a member of the armed forces is involved. In the court below, appellee argued that even if Mayer did not



act within the scope of his employment, the United States would nevertheless be liable if he acted "in the line of duty" as that term is used in legislation granting benefits to servicemen or their dependents for injury or death incurred during the serviceman's period of military service. This contention is based upon the language of 28 U. S. C. 2671 (c) which provides, "'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty."

Appellee seems to read that definition as evidencing Congressional intent to put military personnel into a separate category as to which there would be a different standard of liability. But the purpose of this provision was just the opposite—it was designed to place military men in the same category as civilian personnel so that the Government's liability would be the same whether the employee be civilian or military. The "line of duty" language was used to describe "more correctly" the conduct of military personnel in acting for the Government (*United States v. Eleazer*, 177 F. 2d 914, 918 (C. A. 4, 1949), certiorari denied 339 U. S. 903 (1950)) because soldiers and sailors generally are not considered to be under "employment" with the United States; hence the phrase "scope of employment" without the clarifying language might have had an uncertain or awkward meaning as applied to their conduct. This was also expressly recognized by Congress in specifically defining "employee of the Government" in the Federal

Tort Claims Act (28 U. S. C. 2671 (b)) to include "members of the military or naval forces of the United States." Further recognition was manifested in the committee reports accompanying several of the earlier tort claims bills which incorporated language similar to that appearing in Section 2671. See H. R. Rep. No. 667, 69th Cong., 1st Sess. 6 (1926); H. R. Rep. No. 286, 70th Cong., 1st Sess. 6-7 (1928); H. R. Rep. No. 2800, 71st Cong., 3d Sess. 12-13 (1931).

These definitions, it was pointed out at hearings on the predecessor bills, were inserted to "make it clear that the act covers all federal agencies, including corporate instrumentalities, and all federal officers and employees, *including members of the military and naval forces.*" (Emphasis supplied.) *Hearings Before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. 7 (1942).* The deliberate language used by Congress to make certain that the Act would not be held inapplicable to torts of military personnel, should not, we submit, be wrenched out of context so as to leave a lacuna in the Act's pattern of emphasis upon the normal *respondeat superior* relationship as limiting liability of the United States.

Although the same term—"scope of employment"—may not be entirely appropriate to describe the relationship of serviceman to Government, the same principles that guide courts in determining whether a civilian acts within the "scope of his employment" can be, and have been, applied to military personnel. In virtually every case that has come before the

federal courts involving the question of liability of the United States for tortious acts of a member of the armed forces the courts have followed the normal principles underlying the doctrines of *respondeat superior* and scope of employment, and most have done so without even referring to a "line of duty" test.<sup>11</sup> In some cases, the courts have mentioned that for military men the test is whether the serviceman was acting "in the line of duty" but, recognizing that in this context that term is merely a more apt way of referring to the well-established common law doctrine of *respondeat superior*, have proceeded to apply the usual scope of employment principles.<sup>12</sup> The Supreme

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<sup>11</sup> *Moye v. United States*, 218 F. 2d 81 (C. A. 5, 1955); *United States v. Sharpe*, 189 F. 2d 239 (C. A. 4, 1951); *Christian v. United States*, 184 F. 2d 523 (C. A. 6, 1950); *United States v. Eleazer*, 177 F. 2d 914 (C. A. 4, 1949), certiorari denied, 339 U. S. 903 (1950); *Rutherford v. United States*, 168 F. 2d 70 (C. A. 6, 1948); *Rosa v. United States*, 119 F. Supp. 623 (D. Hawaii, 1954); *Spradley v. United States*, 119 F. Supp. 292 (D. N. Mex., 1954); *Murphy v. United States*, 113 F. Supp. 345 (W. D. N. Y., 1953); *Stekovich v. United States*, 102 F. Supp. 925 (M. D. Pa., 1952); *Poston v. United States*, 101 F. Supp. 904 (W. D. Ky., 1952); *Brown v. United States*, 99 F. Supp. 685 (S. D. W. Va., 1951); *Alexander v. United States*, 98 F. Supp. 453 (E. D. S. C., 1951); *Greenwood v. United States*, 97 F. Supp. 996 (W. D. Ky., 1951); *Parrish v. United States*, 95 F. Supp. 80 (M. D. Ga., 1950); *Bach v. United States*, 92 F. Supp. 715 (S. D. N. Y., 1950); *Creal v. United States*, 84 F. Supp. 249 (W. D. Ky., 1949); *Gibson v. United States*, 83 F. Supp. 990 (S. D. W. Va., 1949); *Cropper v. United States*, 81 F. Supp. 81 (N. D. Fla., 1948).

<sup>12</sup> *King v. United States*, 178 F. 2d 320 (C. A. 5, 1949), certiorari denied 339 U. S. 964 (1950); *Hubsch v. United States*, 174 F. 2d 7 (C. A. 5, 1949), certiorari dismissed, 340 U. S. 804 (1950); *United States v. Campbell*, 172 F. 2d 500 (C. A. 5, 1949), certiorari denied, 337 U. S. 957 (1949); *Baker v. United States*, 127 F. Supp. 644 (D. D. C., 1955); *Roger v. Elrod*, 125 F. Supp. 62 (D. Alaska,

Court of Canada, in interpreting a statute similar to the Federal Tort Claims Act,<sup>13</sup> has also followed the normal *respondeat superior* test in determining liability of the Crown to third persons for the torts of military personnel. *The King v. Anthony*, [1946] Can. Sup. Ct. 569.

In *Campbell v. United States*, 172 F. 2d 500 (C. A. 5, 1949), certiorari denied, 337 U. S. 957 (1949), the claimant also urged that the Court of Appeals adopt a separate, broader standard of liability for the torts of military personnel. In rejecting that suggested construction of the Act the Court of Appeals said (at 503):

Such a construction would be to give to the phrase, "within the scope of his office or employment" not one consistent meaning throughout the act, but two inconsistent meanings, one of these applying to acts of all government employees except members of the armed forces,

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1954); *Paly v. United States*, 125 F. Supp. 798 (D. Md., 1954), affirmed, — F. 2d — (C. A. 4, 1955); *Seidon v. United States*, 123 F. Supp. 828 (E. D. N. Y., 1954); *Moye v. United States*, 117 F. Supp. 236 (S. D. Tex., 1954), affirmed, 218 F. 2d 81 (C. A. 5, 1955); *St. Paul Fire & Marine Ins. Co. v. United States*, 116 F. Supp. 51 (D. Mont., 1953); *O'Connell v. United States*, 110 F. Supp. 612 (E. D. Wash., 1953); *Clemens v. United States*, 88 F. Supp. 971 (D. Minn., 1950); *Cannon v. United States*, 84 F. Supp. 820 (N. D. Cal., 1949), reversed on other grounds, 188 F. 2d 444 (C. A. 9, 1951); *Rutherford v. United States*, 73 F. Supp. 867 (E. D. Tenn. 1947), affirmed 168 F. 2d 70 (C. A. 6, 1948).

<sup>13</sup> Section 19 (c) of the Exchequer Court Act, Can. Rev. Stat. 1927, c. 34, under which tort claims are brought against the Crown in Canada, grants jurisdiction to that court over "Every claim against the Crown arising out of any debt or injury to the person or property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment."

would subject the United States to liability to third persons for acts of its employees only as and to the same extent that a person in private employment would be liable under the law of the state where the accident occurred. The other, applying to acts of military personnel would subject the Government to fantastic claims of liability having no relation to the doctrine of respondeat superior, as it is known and applied, in determining the liability of private persons. It would do this, too, in the face of the known purpose of the Tort Claims Act, as shown by its antecedent history, and the record made in its passage, to make the United States liable to third persons for the acts of its employees under the same circumstances, and no other, as those under which private persons would be liable for the acts of their employees according to the law of the place where the injury occurred.

We believe that this Court agrees with our contention that the Federal Tort Claims Act establishes a single standard of liability, for in *Williams v. United States*, 215 F. 2d 800 (1954), the claimant apparently urged that a separate, broader standard of liability based upon "line of duty" be followed for the torts of servicemen. But this Court rejected that position, holding that "'acting in line of duty' means *acting in line of military duty*." Moreover, the opinion cited with approval *United States v. Eleazer*, 177 F. 2d 914 (C. A. 4, 1949), certiorari denied 339 U. S. 903 (1950), and *United States v. Campbell*, 172 F. 2d 500 (C. A. 5, 1949), certiorari denied 337 U. S. 957 (1949), both of which state expressly that the

“line of duty” language in the Act does not change the applicability of the basic *respondeat superior* principles.<sup>14</sup>

There is language in this Court’s opinion in the *Williams* case<sup>15</sup> which could be interpreted as ruling that a *more stringent* standard of liability applies with respect to the torts of servicemen. Whether the opinion intended to establish a separate standard need not be decided here, however, since, as we have shown above, even under the traditional *respondeat superior* standard of liability, the United States could not be held responsible for Mayer’s *negligence*. For this reason, and because the United States has, in the past, consistently argued that a single standard of liability should be followed, our argument has been presented in terms of the traditional *respondeat superior* principles.

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<sup>14</sup> If any further evidence is needed, see the dissent of Circuit Judge Bone (who wrote this Court’s opinion in the *Williams* case) in *Murphey v. United States*, 179 F. 2d 743 (C. A. 9, 1950) at 746-747, where Judge Bone states:

The Fifth Circuit has held that, as used in the Act, “line of duty” is equivalent to “scope of employment” and is to be determined by the doctrine of *respondeat superior* in the same manner and to the same extent as the liability of private persons under that doctrine is measured in the various states. *United States v. Campbell*, 5 Cir., 172 F. 2d 500, certiorari denied 337 U. S. 957, 69 S. Ct. 1532. See also *Hubsch v. United States*, 5 Cir., 174 F. 2d 7. I think that these two cases correctly state the proper rule of law, are in point, and (under California law) should control our decision in this case.

<sup>15</sup> See 215 F. 2d 807-8.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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*Attorneys, Department of Justice.*

SEPTEMBER 1955.

## APPENDIX

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A. Sections 1346 (b), 2674 and 2671 of Title 28 U. S. C. (the reenactment of the Federal Tort Claims Act, 62 Stat. 933, 982, 983) provide in pertinent part:  
Section 1346. *United States as defendant.*

\* \* \* \* \*

(b) Subject to the provisions of chapter 171 of this title, the district courts \* \* \* shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

\* \* \* \* \*

Section 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

\* \* \* \* \*

Section 2671. *Definitions.*

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

\* \* \* \* \*



“Employee of the government” includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

“Acting within the scope of his office or employment”, in the case of a member of the military or naval forces of the United States, means acting in line of duty.

B. Paragraphs 3003-1b, 4150-1 and 4151 of the *Joint Travel Regulations* provide, in pertinent part:

Par. 3003. TYPES OF ORDERS

1. Permanent change of station

\* \* \* \* \*

b. *Effective Date.* The effective date of orders issued to a member, when the orders do not involve leave or delay en route, is the date of the member's relief from the old station (detachment). When leave or delay prior to reporting to the new station is authorized in the basic order, the amount of such leave or delay will be added to the date of relief from the old station (detachment) to determine the effective date of orders.

\* \* \* \* \*

Par. 4150. PERMANENT CHANGE OF STATION ALLOWANCES

1. *General.* Allowances for permanent change of station travel performed within the United States will be as follows, subject to the election of the traveler except for group travel and travel directed by a particular mode as provided in subpars. 2 and 3:

1. mileage at the rate of 6 cents per mile not to exceed the official distance and subject to the limitations contained in par. 4157 and Chapters 5 and 6; \* \* \*

Par. 4151. ALLOWANCES ON A MILEAGE BASIS

Mileage is an allowance to cover the average cost of first class transportation including sleeping accommodations, cost of subsistence, lodging, and other incidental expenses directly related to the travel. Mileage is payable for the official distance between permanent duty stations, including travel directed via temporary duty points en route under the following circumstances:

1. when travel is performed by privately owned conveyance; \* \* \*

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**United States Court of Appeals**  
**For the Ninth Circuit**

---

UNITED STATES OF AMERICA,     *Appellant,*

vs.

HAROLD KENNEDY,

*Appellee.*

} No. 14767

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

**BRIEF OF APPELLEE**

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THE ARGUS PRESS, SEATTLE

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# United States Court of Appeals

## For the Ninth Circuit

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UNITED STATES OF AMERICA,	<i>Appellant,</i>	} No. 14767
vs.		
HAROLD KENNEDY,	<i>Appellee.</i>	

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

### BRIEF OF APPELLEE

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#### JURISDICTION STATEMENT

Appellant's jurisdictional statement is conceded correct by appellee.

#### RESTATEMENT OF THE CASE

Appellee brought suit against the United States, under the Federal Tort Claims Act, seeking damages for loss of use of his car, personal injuries and property damage, growing out of an automobile collision between appellee's car and a car driven by Staff Sergeant Richard E. Mayer of the U. S. Army, that occurred on the 23rd day of January, 1954, on U. S. Highway No. 99, at a point between the City of Seattle and the City of Tacoma, in the State of Washington. Appellant admitted the negligence of Staff Sergeant Richard E. Mayer (R. 46). Appellant further admitted the following allegation of paragraph III of the Amended Complaint:

"That on the 23rd day of January, 1954, Staff

Sergeant Richard E. Mayer was a member of the Military Forces of the United States, an employee of the *United States of America* \* \* \*. *That at the time of the accident herein referred to said Richard E. Mayer was in fact proceeding as directed and pursuant to that certain order Number 2, dated 5 January, 1954* \* \* \*. (Emphasis supplied)

“That under the terms of said order said Richard E. Mayer was directed to proceed to the Presidio of Monterey, California, and was under the terms of said order, authorized to travel by his privately owned automobile and, under the terms of said order, was entitled to be paid mileage at the rate of 6 cents per mile for the official distance of 1001 miles to the Presidio of Monterey, California; *that the said Richard E. Mayer was in fact so paid for the mileage in question* \* \* \*; *that at the time of the occurrence of the accident hereinafter described said Richard E. Mayer was in fact proceeding to the Presidio of Monterey, California, by his own privately owned automobile.*” (R. 9, R. 10, complaint; R. 46, Answer; R. 48, 49, 50, Findings of Fact.) (Emphasis supplied)

Chief Warrant Officer Cichy, called as expert witness on army matters, testified (R. 60-61) that the language of the order, specifically the abbreviation “T.D.N.,” meant that the travel in question is (was) necessary in the interest of the United States (R. 62), or, as he put it in another way, “Travel directed is necessary to comply with the order” (R. 64). The warrant officer also testified that the publishing authority, the officers who signed the order, had a right of control over the movement of Sergeant Mayer on January 23, 1954, and had the power to change his orders

(R. 64); likewise had the power, at any time during the period in question, to direct Sergeant Mayer to go to any different station in the United States; and that, likewise, his superior officer would have a right and power to tell him to proceed by air, or by bicycle, had they so chosen (R. 65). He likewise testified that Staff Sergeant Mayer, while enroute, as he was, pursuant to travel order, was in fact "in the line of duty within the contemplation of the regulation of the United States Army" (R. 65). He also testified that he would be subject to court-martial if he wilfully disobeyed or failed to comply with the order (R. 64). The trial court, in addition to finding the facts heretofore set out, found:

"The court further finds that on January 23, 1954, the defendant, United States of America, acting through its appropriate officers, could at all times control Staff Sergeant Richard E. Mayer in his actions in the same manner that a private employer might have control over him, had Staff Sergeant Richard E. Mayer been in the employ of such private employer. That the travel herein involved was in the interest of the employer, the United State of America, and necessitated by the interest of the employer and not by the interest of Staff Sergeant Richard E. Mayer; that the work which the employer, the United States of America, desired Staff Sergeant Richard E. Mayer to perform, namely: to study the Chinese-Mandarin language—not for his benefit but for the benefit of the United States of America—created the necessity for the travel herein involved, and that under the law of the State of Washington where this accident happened a private employer would be liable for similar acts committed by his employee."

The trial court entered judgment for appellee against the United States.

### SUMMARY OF ARGUMENT

It is the position of the appellee that the only evidence in the case supports the finding of the trial court that Staff Sergeant was at time of the accident an employee of the United States, and acting in line of duty, and within the scope of his employment; that the travel in question was in the interest of his employer, the United States, and not in the interest of Sergeant Mayer; that the necessity for the travel in question stemmed from the interests of the employer, the United States, and not from the servant's desire or interest; that, in point of fact, at the very moment of the collision the servant was engaged in travel as an incident of his master's orders, and for the purpose of serving the United States' interest, and not to serve his own; that, were the United States a private corporation, and were Sergeant Mayer an employee of such private corporation and directed to travel as he was here enjoined to travel, such traveling would be an incident of his employment in the interest of his employer and within the scope of his employment.

It is the position of the appellee that the pleadings in this case, in effect, admit that Sergeant Mayer, at the time of the accident, was an employee of the United States (R. 46); that the undisputed proof shows that at the time of the accident under Army regulations, his conduct was "in line of duty" (R. 65); that it is admitted, under the pleadings and the proof, that at the very moment of the accident Sergeant Mayer was, in

point of fact, complying with the order to proceed, and was, in point of fact, proceeding, pursuant to the order, to the Army Presidio at Monterey, California (R. 46, R. 50).

It is further admitted, and evidence establishes, that the travel in question was necessary to comply with the order in question and in the interest of the United States and not in the interest of or motivated by any private desire on the part of Sergeant Mayer (R. 50).

It is further admitted by the United States that the Master—the United States—did in fact pay for the travel in question (R. 46, R. 49).

It was further undisputed, under the evidence in this case, that the United States—the Master—at the very moment of the accident in question, had the power and right of control over Sergeant Mayer—the servant—by cancelling the order, changing it or modifying it. In short, the Master—the United States—under the evidence in this case had a complete right of control over the servant—Sergeant Mayer (R. 50, R. 65).

The Supreme Court of the United States has stated that the language of the Federal Tort Claims Act, 28 U.S.C.A. 2674 “indicates a Congressional purpose that the United States be treated as if it were a private person in respect of torts committed by its employees.” *United States v. Aetna Casualty Co.*, 338 U.S. 366, 70 S. Ct. 207, 210, 94 L. ed. 171.

The law of the place of the accident has been applied to determine the question of scope and course of employment. *Murphy v. United States*, 179 F.(2d) 743, 746 (C.A.9). *United States v. Eleazer*, 179 F.(2d) 914,

917 (C.A.4). *O'Connell v. United States*, 110 F. Supp. 612.

Under the law of the State of Washington, the fact that the servant was driving his own car at the time of the accident does not compel a conclusion that he was not within the scope and course of his employment. See *Rice v. Garl*, 2 Wn.(2d) 403, 409, 98 P.(2d) 920, and cases cited therein. 57 A.L.R. 739, 87 A.L.R. 787, 112 A.L.R. 921.

The established rule in Washington is stated as follows:

“Where the servant is combining his own business with that of his master or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears the servant *could not have been directly or indirectly serving his master.*” *Carmin v. Port of Seattle*, 10 Wn.(2d) 139, 116 P.(2d) 338. (Emphasis supplied)

Under Washington law an activity is within the scope of employment if the activity is authorized by the employer either expressly or by fair implication, and in addition to this, the employer is liable if the act complained of was incidental to the acts expressly or impliedly authorized. *Carmin v. Port of Seattle*, 10 Wn.(2) 139, 153, 116 P.(2d) 338. *O'Connell v. United States*, 110 F. Supp. 615.

## ARGUMENT IN SUPPORT OF JUDGMENT

In a word, it is the position of the plaintiff that, under the law of the State of Washington governing the doctrine of *respondeat superior* that the defendant, the United States, were it a private employer of Sergeant Mayer under the circumstances of this case would be liable as a matter of fact and law. Judge Driver, in *O'Connell v. United States*, 1950, 110 F. Supp. 613, p. 614, stated:

“The statutory provision, mentioned above, that when applied to military personnel acting within the scope of their employment when acting in line of duty was not intended to establish a different measure of liability of the United States for the acts of military employees than for the acts of civilian employees. *And at least in this Ninth Circuit, the law of the place where the act occurred is to be applied to determine not only whether the act complained of constituted negligence or actionable wrong, but also whether in doing the act an employee of the United States was acting within the scope of his office or employment. Murphy v. United States*, Ninth Circuit, 179 F.(2d) 743.

“In the State of Washington, where the negligent act occurred, *respondeat superior* is a recognized rule of law. An employer is liable for the negligence of his employee, when a negligent act is committed in the execution of the employer's business within the scope of the employment.

“In applying the rule, the Washington Supreme Court has held that the activities of an employee are within the scope of his employment, if they are authorized by the employer, either expressly or by fair implication from the nature of the duties to be performed.”

Judge Driver then goes on to state in the case on the basis of a hypothetical question, that is, assuming that the military man in question was in fact an employee of a private corporation. In this case, the question is, if Sergeant Mayer were an employee of a private corporation, would he have been acting within the scope of his employment by the standards of Washington law at the time the accident occurred? Let us imagine a comparable situation. In this case let us assume that Sergeant Mayer was an employee of a Washington corporation, and that he was told by his employer to go to a distant town to undertake the performance of some type of work on behalf of the corporation. The question would be whether or not, in going to that town in his own private automobile for the purpose of undertaking the private work of the employer, would the employee be within the scope and the course of his employment? Bear in mind that in this case Sergeant Mayer was directed to proceed to the Presidio at Monterey, California, for the purpose of studying the Chinese language. Obviously it was necessary for the United States to have its employee arrive at the Presidio, at Monterey, California, for the express purpose of being educated in the Chinese language. In short, the travel is an incident to the individual's employment. The travel was at the request of and pursuant to the order of the master, the employer. It is in the interest of the employer's business that the travel is incurred, and not for the benefit of the servant, the Sergeant in this case. Let us measure these facts under the principles of Washington law just stated, and the specific cases in which the principles were applied.



The great weight of authority in the United States supports the rule headnoting annotations found in 57 A.L.R. 739; 60 A.L.R. 1163; 87 A.L.R. 783; and 112 A.L.R. 920.

In *Birchfield v. Department of Labor and Industries*, 165 Wash. 106, 4 P.(2d) 858, an employee of stevedoring company was directed by his employer to proceed from Longview, Washington, to Vancouver, Washington, to moor a ship that was to arrive at Vancouver the following day. The employee was left free to use any means of transportation he desired. The only condition being that he should arrive in time to resume his duties as required by the master. The employee was allowed to be reimbursed to the extent of the bus fare between the two towns. The accident occurred in between the two towns while the employee was driving his own car. The sole question in the case was whether such an employee was at that time within the scope of his employment. The Washington court held as matter of law that such an employee was in the scope and course of his employment. In so holding the court said, p. 110:

“The members of that crew were by the nature of the business, obliged to report at various places where work was to be performed. The men so reporting at such various places of work were allowed transportation charges to and from their home port, but only received pay for the time actually employed. When transferring from one place to another as directed by his employer, the appellant was performing his duty to that employer and was then within the scope of his employment. The transfer from port to port was just

as much a matter of his employment and a duty for him to perform as was the labor which ensued after his arrival. That he was paid the cost of transfer and not wages during the time, is wholly immaterial. The question is: Was he within the scope of his employment?

“It was as much the duty of the crew to move from port to port as it was to perform the work at the port on arrival, and the crew members, while so moving, were as much in the course of their employment as when actually engaged in loading or unloading a ship and earning pay.”

In *Hilding v. Dept. of Labor and Industries*, 162 Wash. 168, 298 Pac. 321, a lumber grader driving his own car was injured while returning from Spokane to Asotin, after completing the day's work. The court said:

“At the time the accident occurred, Hilding was acting in furtherance of his employer's business, and hence was in the course of his employment. He was on the most direct route; he was traveling on the highway which he was expected to use.”

In *Morris v. Dept. of Labor and Industries*, 179 Wash. 423, 38 P.(2d) 395, a repairman for Puget Sound Power & Light Company was injured while driving home at night, and he was held to be in the course of his employment, even though he had stopped to attend a moving picture show with a young lady before going home.

These are Workmen Compensation cases, but our court has said that the test of whether a workman is in the course of his employment is the same in Workmen Compensation cases as in other cases.

“Insofar as our Workmen’s Compensation Act is concerned, the rules for determining the existence of the relation of employer and employee are the same as those applied at common law for determining the relation of master and servant.”

*Hubbard v. Dept. of Labor and Industries*, 98 Wash. 354, at page 358, 167 Pac. 928.

In *Buckley v. Harkins*, 114 Wash. 468, 195 Pac. 250, an automobile salesman driving his own car, was on his way home at the time of the accident after the close of business, and had diverted from his direct route to take another employee to the ferry. The court refused to set aside the verdict of the jury, holding that it was for the jury to decide whether or not the salesman was in the course of his employment. In *Kludas v. Inland-American Printing Company*, 149 Wash. 180, 270 Pac. 429, the accident occurred at 10:00 A.M., and the employee was driving his own car, but both the employee and his superior gave testimony to the effect that the employee was not then on duty for the company but was using the car to do some Christmas shopping. The court held, however, that it was for the jury to decide and refused to set aside a verdict for the plaintiff. In *Thompson v. Dept. of Labor and Industries*, 192 Wash. 501, 73 P.(2d) 1320, employees of Safeway Stores were killed while traveling at night from Coeur d’Alene to Sand Point to investigate the advisability of establishing a meat market in the company’s store at Sand Point. They were using an employee’s car and had spent the early part of the evening with three young ladies at a tavern. The jury’s verdict to the effect that the employees were in the course and scope

of their employment was upheld by the court. In *Dahl v. Moore*, 161 Wash. 503, 297 Pac. 218, a real estate company's saleswoman, driving her own car to a place selected by the master to show real estate, was held in the scope and course of her employment. In *Wilson v. Times Printing Co.*, 158 Wash. 95, 290 Pac. 691, one Maxwell drove his own car, delivering daily and Sunday Times, receiving \$98.00 per month salary. The question on appeal was whether or not the publisher of the newspaper was liable under doctrine of *respondeat superior* for Maxwell's negligence. The court held that it was a question for the jury. The court said

“The test to be applied in this case is, in our judgment, well stated by the late Justice Cardoza, speaking for the New York court in *Mark, defendants, v. Gray*, 251 N.Y. 90, 167 N.E. 181, at page 183:

“ ‘If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own, *Clausen v. Purcell Motor Car Co.*, 231 N.Y. 273, 131 N.E. 914.

“ ‘If, however, the work had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been cancelled upon failure of the private purpose, though the business errand was undone, the travel was impersonal and personal the risk.’ ”

In *Rice v. Garl*, 2 Wn.(2d) 403, 98 P.(2d) 920, the Washington court held:

“If the workman's place of employment is subject to frequent variable changes of substantial distance, his transportation may be of such im-

portance to both himself and his employer that it is made a part of his employment.” (Citing cases herein cited)

In this case, Garl's automobile ran into a minor while Garl was en route in his own automobile from his employer's plant in Seattle to Bellingham. It appeared further that Garl was not to be reimbursed by his employer, the Standard Oil Company, for the travel involved, however, it did appear that it was necessary for him to go to Bellingham to do the work in question. It even appeared that the employer furnished its own truck for transportation. However, as the work involved more than a week, Garl proceeded in his own automobile. The Washington court, citing most of the cases cited herein, held that under the facts herein recited a jury's verdict finding Garl was in the scope and course of his employment should not be disturbed. See also where the rule of *Rice v. Garl* is affirmed in *Melofevich v. Cichy*, 30 Wn.(2d) 702, page 716, 193 P.(2d) 342, and *James v. Ellis*, 44 Wn.(2d) 599, page 605, 269 P.(2d) 573.

In *Purcell v. U. S.*, 130 F.Supp. 882—a case directly in point—the District Court found that the relationship between an officer of the U.S. Army and the United States was that of master and servant, where it appeared that the officer was, at the time of an accident, driving his own automobile with the right of reimbursement and subject to orders in no way differing from the orders in the instant case. The District Court likewise found that under the law of California the officer in question was in the scope of his employment and that the United States was subject to liability to

a third party, under the Federal Tort Claims Act, for the accident in question.

The *Purcell* case presents an excellent discussion of the applicable law of master and servant and adequately distinguishes most of the cases cited in appellant's brief.

We submit that under rules of Washington law governing the doctrine of *respondeat superior* there is simply no question that were the United States a private corporation, and were Sergeant Mayer merely its employee, and were such a private corporation to send Sergeant Mayer to San Diego for the purpose of receiving an education in a particular line of business, and were he either expressly or impliedly given permission to travel by his own automobile and to be reimbursed for the time therefor, and if it further appeared that it was necessary for him to go there to get educated in the master's interest, under the rule of *Rice v. Garl, supra*, and the other cases cited herein, Sergeant Mayer would have been in the course and scope of his employment.

Appellant's major thesis (see pages 10 through 15 appellant's brief) is that at the time of the accident here in question the relationship between the United States and Sergeant Mayer was not that of master and servant, because the United States lacked the right or power to command or direct Sergeant Mayer as to the details of his driving at the time of the accident. Suffice to say that the cases cited by appellant properly state the rule of the jurisdiction herein that arose. However, it is to be noted that all of those cases are

founded upon the case of *Khoury v. Edison Electric Illum'g Co.*, 265 Mass. 236, 164 N.E. 77. Admittedly, this case is directly contrary to the rule of the Washington case of *Rice v. Garl*, *supra*. As a matter of fact, the *Khoury* case was cited to the Washington court in *Rice v. Garl*, and the Washington court expressly rejected its rule and declined to follow it. (See *Rice v. Garl*, 2 Wn.(2d) 403, p. 411).

As stated in *Purcell v. U.S.*, the case of *U.S. v. Eleazer*, 177 F.(2d) 914 (C.A. 4, 1949), is adequately distinguished in that in that case the trial court found that Lieutenant Tulley, at the date of the accident, "was on his way home for the enjoyment of his deferred leave" (See page 916 of the opinion).

The case of *Reiling v. Missouri Ins. Co.*, 236 Mo. App. 164, 153 S.W.(2d) 79, cited by appellant, is a case wherein the question involved was whether or not the alleged servant was an independent contractor or an employee. In effect, the case followed the *Khoury* rule in distinguishing between an independent contractor and agency relationship. (See *Rice v. Garl*, *supra*.)

In the case at bar there can properly be no question under the facts to support the theory of independent contractor, and the rules relative to the distinction are immaterial. (*James v. Ellis*, 44 Wn.(2d) 599, p. 605.)

It must be borne in mind that under the pleadings in the case at bar it is admitted:

"\* \* \* That at the time of the accident herein referred to said Richard E. Mayer was in fact proceeding as directed and pursuant to that certain order Number 2, dated 5 January, 1954 \* \* \*."

“\* \* \* that said Richard E. Mayer was in fact so paid for the mileage in question \* \* \*; that at the time of the occurrence of the accident hereinafter described said Richard E. Mayer was in fact proceeding to the Presidio of Monterey, California, by his own privately owned automobile.”

The Washington court, in *Femling v. Star Publishing Co.*, 195 Wash. 395, 81 P.(2d) 293, which was later reversed on other grounds, stated:

“But the authorities are practically unanimous in making it clear that the test is right to control, and not actual control, and that the non-existence of actual control is merely evidence upon which to determine the basic fact. The question is not—Did appellant control Norman? but—Could it have controlled him? It is this second question which appellant asks the court to answer, as a matter of law, in the negative.

“We are of the opinion that the jury could well have found that appellant had the right to tell Norman where to go and when to go. We cannot say that it could not also have found that appellant had the right to tell him how to go.”

Under the circumstances in this case, on the question of control, it is undisputed that at the time of the accident the United States had an absolute right and power to direct Sergeant Mayer to do anything it chose. It could tell him where to go and how to go, and could, in fact, have changed his orders (see R. 64, 65) and Sergeant Mayer would have been subject to court-martial for disobedience of any of those orders.

On pages 19 and 20 of appellant's brief, appellant argues that the travel offered by the order was between



Fort Lewis and the Presidio at Monterey, California; that since the accident occurred between Seattle and Fort Lewis, Sergeant Mayer was necessarily on leave status.

Appellant overlooks that, under the pleadings in this case and under the facts, it is admitted that at the time of the accident herein, Sergeant Mayer was, in fact, proceeding as directed and pursuant to the orders in question and was, in fact, paid for the mileage in question.

In the case of *Birchfield v. Dept. of Labor & Industries*, 165 Wash. 106, p. 112, wherein a similar argument was made, the court said:

“The minority seems to lay considerable stress upon the fact or probability that the appellant, leaving Longview when he did, had several hours of time, more than was necessary to reach the dock in Vancouver at an early morning hour appointed, and that he would or might have gone to his home in the interim. We think that is wholly beside the question and utterly immaterial. Any extra time which appellant might have used for his personal affairs would perhaps make that time and those affairs outside of the course of his employment; but he was not injured during any such outside occupation. It was immaterial to his employer whether, of the intervening hours between the cessation of the work at Longview and its resumption at Vancouver, appellant used the first, the last, or any portion to make the trip. It was his duty to make the trip, and while making the trip at any time during the interval, he was in the course of his employment.”

It is what the employee is in fact doing at the time

of the accident that determines his status, and not what he might have been doing.

In the case at bar, it is admitted that the employee was, in fact, proceeding pursuant to the order, for the benefit of the employer and not for his own benefit.

Conceivably, the employee could have been going to a dance or on some frolic of his own, and admittedly a different set of rules of law would apply. However, in the case at bar it is admitted that the employee was on his master's business and acting pursuant to his master's orders and for his master's benefit at the time of the occurrence of the accident. Under such circumstances, appellant's argument is untenable.

Appellant argues that under the Federal Tort Claims Act, the concept "in the line of duty" is more restrictive than the doctrine of *respondeat superior*.

In the case at bar the only evidence as to whether or not Sergeant Mayer was in the line of military duty at the time of the accident is to the effect that he was (see testimony of Warrant Officer Cichy, R. 65). Appellee therefore sees no reason to disputate the merits of appellee's contention because appellee necessarily meets the requirements of both tests.

Appellant asserts that Federal law should control the question of master and servant and its subsidiary rule, scope and course of employment. However, appellant cites no body of Federal law on the subject and, indeed, appellee knows of none.

In this case the statute itself, we believe, directs that the issue be decided in accordance with local law and all of the cases in this Circuit would seem to so hold.

See *Murphy v. U.S.*, 179 F.(2d) 743 (C.A. 9). See also *O'Connell v. United States*, 110 F. Supp. 613, 614.

### CONCLUSION

Appellee submits that under the pleadings in this case it is necessarily admitted that the relationship between Sergeant Mayer and the United States at the date of the accident was that of master and servant and that under the facts the trial court was justified in finding from the facts that were admitted in the pleadings that Sergeant Mayer was, at the time of the accident, within the scope and course of his employment and even though more than one inference could be reasonably drawn from the facts relative to the scope and course of employment, the issue is to be resolved by the trier of the facts and not as a matter of law (*Rice v. Garl*, 2 Wn.(2d) 403, 98 P.(2d) 301. *Carmin v. Port of Seattle*, 10 Wn.(2d) 139, 153, 116 P.(2d) 338) and that this court will not disturb the trial court's findings of fact on conflicting inferences unless they are clearly erroneous. (See Rule 52, Rules of Civil Procedure for District Courts.)

It is respectfully submitted that the judgment of the trial court should be affirmed.

GEORGE R. MOSLER and

GEORGE J. TOULOUSE, JR.

*Attorneys for Appellee.*



IN THE  
United States Court of Appeals  
For the Ninth Circuit

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UNITED STATES OF AMERICA, *Appellant*

v.

HAROLD KENNEDY, *Appellee*

---

On Appeal from the United States District Court for the  
Western District of Washington, Northern Division

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REPLY BRIEF FOR APPELLANT

---

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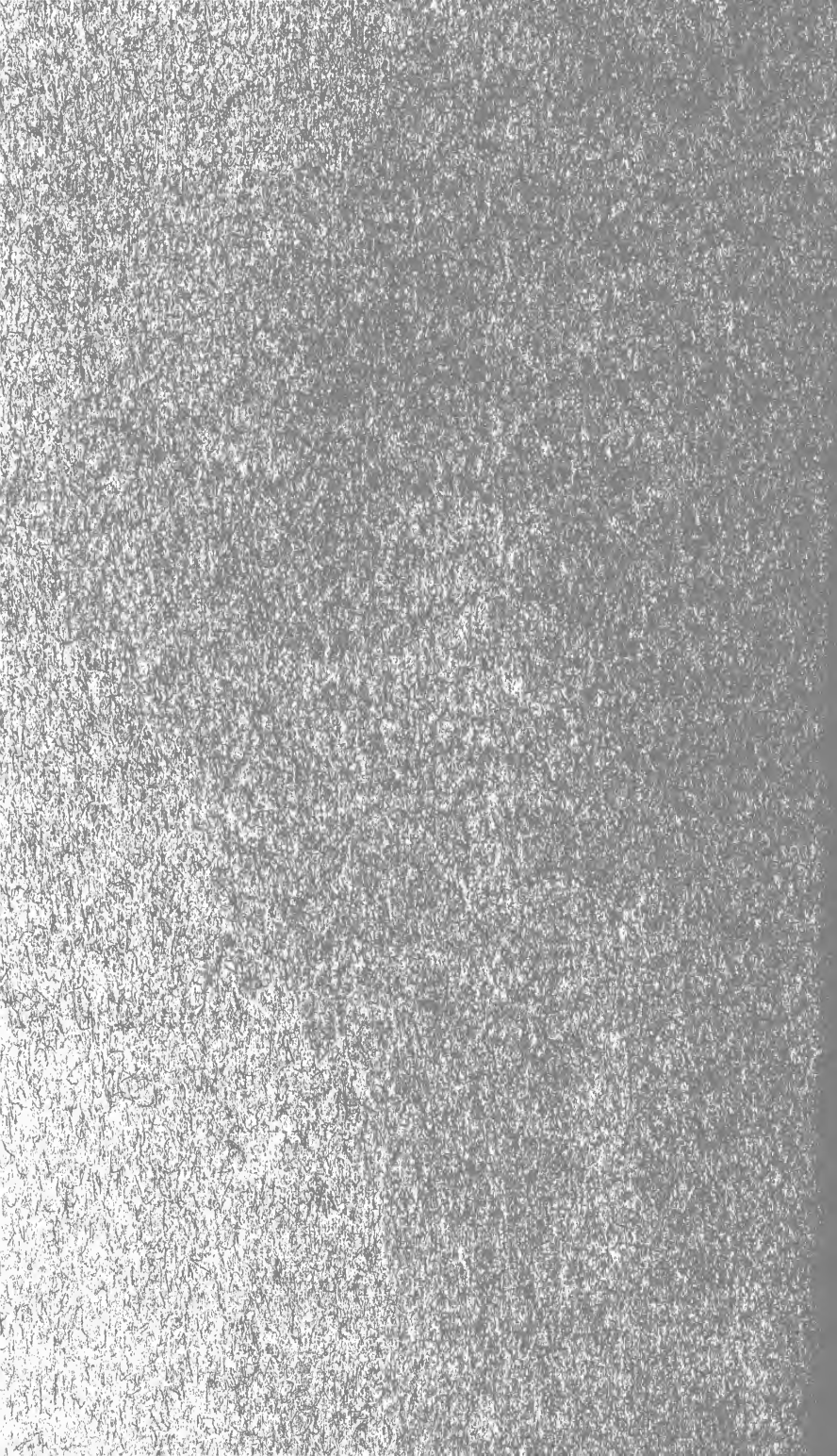
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PAUL P. O'BRIEN, CLERK



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IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

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No. 14767

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UNITED STATES OF AMERICA, *Appellant*

v.

HAROLD KENNEDY, *Appellee*

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On Appeal from the United States District Court for the  
Western District of Washington, Northern Division

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**REPLY BRIEF FOR APPELLANT**

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**ARGUMENT**

The decision of the United States Supreme Court in *Williams v. United States*, 24 U.S. Law Week 3107 (Oct. 17, 1955) has shed new light on the issues posed in this case and has made advisable some comment on, and analysis of, appellee's answering brief. The Supreme Court remanded the *Williams* case for reconsideration and application of the governing principle that state law of *respondeat superior* is controlling. Thus the effect of that decision is to affirm the contention made in Point II of our main brief that the only standard for liability under the Federal Tort Claims Act is that of *respondeat superior*; "line of

duty" considerations are irrelevant. It also makes clear, contrary to our contention in Point I, that the law of Washington State, rather than federal law, controls the application of that *respondeat superior* doctrine. Hence we shall here elaborate on the statement in our main brief that even if Washington law were applicable the judgment below should be reversed.

# **1. Respondeat Superior Principles Under Washington Law Are No Different From Those Under Federal Law**

As we stated in our main brief (n. 3, p. 9) the general principles of *respondeat superior* under Washington law are the same as those under federal law:

The general rule is that a party injured by the negligence of another must seek his remedy against the person who caused the injury, since such person is alone liable. To this general rule the case of master and servant is an exception, and the negligence of the servant, while acting within the scope of his employment, is imputable to the master. But, to bring a case within this exception, it is necessary to show that the relation of master and servant exists between the person at fault and the one sought to be charged for the result of a wrong; and, *the relation must exist at the time, and in respect to the particular transaction, out of which the injury arises. \* \* \* An act of the servant not done in the execution of services for which he was engaged cannot be regarded as the act of the master.*<sup>1</sup> [Emphasis added. *Roletto v. Department Stores Garage*, 30 Wash. 2d 439, 442, 191 P. 2d 875, 877 (1948).]

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<sup>1</sup> See n. 1, next page.

It is also well-settled Washington law that to establish the relation of master and servant a plaintiff must prove (1) that the tortious act was related to, or within the "scope" of, the duties assigned to the servant (*i.e.*, that the act was committed while the servant was furthering the interests of his employer), *McGrail v. Department of Labor and Industries*, 190 Wash. 272, 277, 67 P. 2d 851, 853 (1937), and (2) that at the time the act was committed the master had full control, or the right to control, the manner and details of the servant's activities. *Leech v. Sultan R. & Timber Co.*, 161 Wash. 426, 427, 297 Pac. 203, 204 (1931).<sup>1</sup>

**2. The Facts of This Case Do Not Meet the Requirements of the Washington Law of Respondeat Superior for Imposing Liability Upon the United States**

In our main brief (pp. 12-21) the facts of this case were analyzed to show why the United States cannot be said to have had sufficient interest in, or the type of supervision and control over, "the particular transaction" in which Sergeant Mayer was engaged at the time of the accident to warrant its being held liable under the doctrine of *respondeat superior*, and we will not now reiterate that analysis. However, in his answering brief, appellee cites a number of cases wherein the Washington courts have held employees to have been acting within the scope of their employment while driving their own cars. These decisions, argues appellee, require affirmance of the judgment

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<sup>1</sup> These are the very same standards that we stated to be applicable under federal law. Appellant's brief, pp. 7-8.

below. In fact, none of those decisions are apposite to consideration of this case.

In each of the cases cited by appellee, travel between varying points was an essential part of the assigned duties of the employee concerned. For example, in *Rice v. Garl*, 2 Wash. 2d 403, 98 P. 2d 301 (1940), so heavily relied upon by appellee, the employee was a repairman hired to make periodic or emergency repairs upon distributing stations, plants and other properties in various parts of the state. Thus, his work required frequent trips during his regular working hours as a necessary part of the duties for which he was hired; *i.e.*, it was understood to be within the "scope" of his duties or employment that he would be required to travel frequently, either by conveyance provided by the employer or by his personal vehicle. As the court explained in the *Rice* case, it was because of this frequent travel between different points of varying distances required by the employer that the court found inapplicable the usual rule that employees using their own cars to go to work are not acting within the scope of their employment. The court there said, "if the workman's place of employment is subject to frequent and variable changes of substantial distance, his transportation may be of such importance to both himself and his employer that it is made a part of his employment." 2 Wash. 2d at 409.

Similar relationships existed in *Burchfield v. Department of Labor and Industries*, 165 Wash. 106, 4 P. 2d 858 (1931) (stevedore hired to work at different

ports);<sup>2</sup> *Buckley v. Harkins*, 114 Wash. 468, 167 Pac. 928 (1921) (truck salesman required to visit customers);<sup>3</sup> *Carmin v. Port of Seattle*, 10 Wash. 2d 139, 116 P. 2d 338 (1941) (contact man who traveled throughout state); *Dahl v. Moore*, 161 Wash. 503, 297 Pac. 218 (1931) (real estate salesman required to show customers various properties); *Femling v. Star Publishing Co.*, 195 Wash. 395, 81 P. 2d 293 (1938) (newsboy who delivered papers by bicycle); *Hilding v. Department of Labor and Industries*, 162 Wash. 168, 298 Pac. 321 (1931) (lumber grader required to visit sites of lumber); *James v. Ellis*, 44 Wash. 2d 599, 269 P. 2d 573 (1954) (roof repairman); *Kludas v. Inland-*

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<sup>2</sup> Despite appellee's insistence to the contrary, cases holding an employee to be within the scope of employment for purposes of workmen's compensation are not suitable as precedents for finding an employee to be within the scope of employment for the purpose of imposing tort liability upon his employer—because of the different considerations involved. As the Washington Supreme Court itself has said:

This Court is committed to the doctrine that our workmen's compensation act should be liberally construed in favor of its beneficiaries. It is a humane law and founded on sound public policy, and is the result of thoughtful, painstaking and humane considerations; and its beneficent provisions should not be limited or curtailed by a narrow construction. *Hilding v. Department of Labor and Industries*, 162 Wash. 168, 175, 298 Pac. 321, 324 (1931).

Also see *N.L.R.B. v. Hearst Publications*, 322 U.S. 111 at 122 (1944), where the Supreme Court stated, "within a single jurisdiction a person who, for instance, is held to be an 'independent contractor' for the purpose of imposing vicarious liability in tort may be an 'employee' for the purposes of particular legislation, such as unemployment compensation."

<sup>3</sup> In addition, the facts of the *Buckley* case show that the employee had no license to drive the car as his own "but drove it under the license of and as the property of" his employer. See *Bourus v. Hagen*, 192 Wash. 588, 591, 74 P. 2d 205, 207 (1937).

*American Printing Co.*, 149 Wash. 180, 270 Pac. 429 (1928) (deliveryman); *Melosevich v. Cichy*, 30 Wash. 2d 702, 193 P. 2d 342 (1948) (pinball machine repairman and inspector); *Morris v. Department of Labor and Industries*, 179 Wash. 423, 38 P. 2d 395 (1934) (installer and repairman of electrical equipment); *Thompson v. Department of Labor and Industries*, 192 Wash. 501, 73 P. 2d 1320 (1937) (chain meat market supervisor required to inspect various stores); *Wilson v. Times Printing Co.*, 158 Wash. 95, 290 Pac. 691 (1930) (newspaper deliveryman), all relied upon by appellee. In every one of the above cases the employee, whether he was deliveryman, salesman, inspector, contact man, or outside repairman, was required—as part of the every-day performance of his duties—to travel varying distances from place to place on “company time.” Cf. *Carter v. Dep’t of Labor and Industries*, 183 Wash. 86, 48 P. 2d 623 (1935).

In the instant case this is not true. Sergeant Mayer’s work, either as an ordinary soldier or as the signalman he was, required only his presence at an Army post for the performance of ordinary soldier’s or signalman’s duties within the limits of the post, and, more specifically with respect to his newly assigned duties, his attendance at the Army Language School for the purpose of learning the Chinese language. The only travel required of him was this single, isolated trip for changing his permanent station; his assigned duties were thus not to commence until after he completed his travel. Appellee has cited no case where a private employer was held liable for the negligence of an employee while driving his own car and while moving his

residence from one city to another for the purpose of commencing a new job at a different branch office of the same employer. The courts of Washington have never imposed liability in such circumstances. On the contrary, it has been held that “An act of the servant not done *in the execution of services for which he was engaged* cannot be regarded as the act of the master.” [Emphasis added.] *Roletto v. Department Stores Garage*, 30 Wash. 2d 439, 442, 191 P. 2d 875, 877 (1948).

Moreover, as we emphasized in our main brief (pp. 3, 13, 19-20), at the time of the accident here involved Sergeant Mayer was not traveling from his old station to the new one and hence could not have been serving the interests of the United States. He was not, at the time, traveling under that part of his orders requiring a change of station but rather traveling under that part of his orders authorizing him to take leave. Mayer was thus in a leave, not duty, status and was driving his own car on a public highway near his home in Seattle. If he was in fact intending to go to Fort Lewis at that time, the most that could be said is that he was returning from his home to his former duty station. As the Washington courts have repeatedly held, travel between home and work is not within the scope of employment. *Bourus v. Hagen*, 192 Wash. 588, 74 P. 2d 205 (1937).

Appellee contends that the travel orders, as interpreted in the testimony of Warrant Officer Cichy, establish incontrovertibly that Mayer's travel was in the Government's interest. But as explained in our main

brief (pp. 20-21) the symbol "TDN" appearing in those orders, although translatable as "travel directed is necessary to comply with the order" (R. 64), is merely a term of art used to satisfy statutory prerequisites for compensating travel. It does not even imply that the payee is an employee of the United States, much less that he is actively serving the Government's interests at the time of his travel or that his travel is within the scope of his assigned duties or employment. Moreover, the travel that was considered "necessary" and for which Mayer was to be reimbursed by the United States was the travel between Fort Lewis and Monterey, not that between Seattle and Fort Lewis. At the time of the accident Mayer was therefore not engaging in compensable travel and hence the part of his orders containing the symbol "TDN" is inapplicable.

Finally, appellee contends that the United States had full control over Sergeant Mayer's activities since he was subject to military discipline and could have been court-martialed had he failed to obey the lawful orders of a superior officer. This is undeniably true. The Government has, at all times, a potential right to control the conduct of members of the armed services *in general*, even when they are engaging in outside work for which they are compensated by another employer. But this is not enough to impose *respondeat superior* liability upon the United States, even if it be assumed that Mayer was acting in furtherance of the Government's interests. For the United States to be held liable, appellee must also have shown that the



United States had the right to control the *particulars* of Mayer's conduct, that the vehicle he was driving and his operation of that vehicle were under the Government's control, or potentially under its control. *Nettleship v. Shipman*, 161 Wash. 292, 296 Pac. 1056 (1931). This, appellee failed to establish. Appellee has nowhere shown that the United States could have controlled Mayer's operation of his personally owned property. The admitted facts show the contrary, especially since Mayer was on leave at the time of the accident. See our main brief, pp. 13-15, 18-20.

### CONCLUSION

For the foregoing reasons and for the reasons stated in the Government's main brief hitherto filed, we respectfully submit that the judgment below should be reversed.

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*Attorneys, Department of  
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DECEMBER, 1955



No. 14768

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**United States**  
**Court of Appeals**  
**For the Ninth Circuit.**

---

LY SHEW, as Guardian Ad Litem of Ly Moon and  
Ly Sue Ning, Minors,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State  
of the United States,

Appellee.

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**Transcript of Record**

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**Appeal from the United States District Court for the**  
**Northern District of California,**  
**Southern Division.**

FILED

OCT 20 1955

PAUL P. O'BRIEN, CLERK



No. 14768

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

STANLEY J. GALE, ESQ.,

320 Ochsner Building,  
Sacramento, California,

For Appellants.

CHAUNCEY TRAMUTOLO, ESQ.,

United States Attorney,  
San Francisco, California,

For Appellee.



In the District Court of the United States for the  
Northern District of California, Southern Division

Civil No. 30159

LY SHEW, as Guardian Ad Litem of LY MOON,  
a Minor,

Plaintiff,

vs.

THE HONORABLE DEAN ACHESON, as Secre-  
tary of State of the United States,

Defendant.

PETITION FOR DECLARATORY JUDGMENT  
UNDER SEC. 503 OF THE NATIONALITY  
ACT OF 1940

Comes Now, Ly Shew, as guardian ad litem of Ly  
Moon, a minor, and seeking declaratory relief and  
judgment on behalf of said minor, complains and  
alleges as follows:

I.

That the said Ly Shew is the natural blood father  
of the minor herein and is a citizen of the United  
States and was first admitted to the United States  
as a citizen on July 15, 1912, at the time of his en-  
trance at the Port of San Francisco, ex SS  
"Korea" and that as evidence of his citizenship has  
been issued Certificate of Identity #8216 by the  
Immigration and Naturalization Service of the  
United States.

That since the date of his first entrance into the

United States as a citizen thereof and at the time of the birth of his son, Ly Moon, and at the present time, the said Ly Shew has been and now is a permanent resident of the City and County of San Francisco, State of California, within the jurisdiction of the District Court of the United States in and for the Northern District of California.

## II.

That after the admission of the said Ly Shew to the United States as a citizen thereof, the said Ly Shew, while maintaining his permanent residence and domicile within the said City and County of San Francisco, State of California, made a trip to China in 1932 and during said trip contracted a lawful and valid marriage in accordance with the marriage customs and ceremonies there recognized and prevailing with Chin Shee in the Toyshan District, Kwongtung Province (Canton) China, and that as a result of the said marriage there was born to the said Chin Shee and the said Ly Shew as the lawful issue thereof a son named Ly Moon on or about October 18, 1933, in the Jung Sing Hung Village, Toyshan District, Kwongtung Province (Canton) China, which said son is the petitioner upon whose behalf this action is brought.

That the said Ly Shew and the said Chin Shee are also the parents of other children born as a result of said marriage.

## III.

That the said marriage, and the details thereof, and the birth of the said Ly Moon, were duly re-

ported to the United States Immigration and Naturalization Service upon the occasion of the said Ly Shew's trip to China and his return therefrom and other departures and returns to this country made through the Port of San Francisco.

#### IV.

That the said Ly Moon, a minor, is a citizen of the United States under the provisions of Sec. 1993 revised statutes of the U. S. (8 USCA 6) and Secs. 101 and 504 of the Nationality Act of 1940 (54 Stat. 1137; 8 USCA 907).

#### V.

That the said Ly Moon, a minor, now temporarily resides at 104 Kilung Street, first floor, c/o Hum Shui Po, Kowloon, in the British Crown Colony of Hong Kong, and the said Ly Moon, a minor, hereby claims the City and County of San Francisco, State of California, as his permanent residence.

#### VI.

That for over four (4) years last past the said minor has presented various and sundry applications to the American Consul at Canton, China, and in the British Crown Colony of Hong Kong, for permission to enter the United States as a citizen thereof and/or for the purpose of having his claim to citizenship passed upon and adjudicated by the Immigration and Naturalization Service of the United States and despite said repeated applications, the said minor has been unable to secure a

visa, permit or permission to travel to and enter the United States from the said American Consul; and, the said American Consul has refused to grant said application, visa or permit to travel to the United States for reasons that are unknown to petitioner herein.

## VII.

That the Honorable Dean Acheson, defendant herein, as Secretary of State of the United States, is the duly qualified, authorized and acting administrative head of the Department of State of the United States and in such capacity is in charge of the various United States Consuls and Consulates, including the United States Consulate located in the British Crown Colony of Hong Kong and as the administrative head of such department is responsible for and controls the administrative functions of the said United States Consul; and that the said American Consul in the British Crown Colony of Hong Kong is the official representative of and subject to the orders and direction of the defendant herein.

## VIII.

That the said Ly Moon, a minor, has never committed any act or executed any document of repatriation nor renounced his United States citizenship and has always considered himself to be and declared himself to be a citizen of the United States and it has always been the intention of the said minor to come to the United States, the country of his citizenship, and it has always been the intention of said minor to keep and maintain his domicile

and residence within the said United States and in this behalf the said minor claims residence and domicile within and in the Northern District of California and more particularly within the jurisdiction of this Court.

### IX.

That under the provisions of Sec. 503 of the Nationality Act of 1940 (54 Stat. 1171-1172; 8 USCA 903), the said minor is entitled to prosecute and maintain an action in this Court declaring him to be a national of the United States and under the provisions of such act he is entitled to proceed to and enter the United States for the purpose of presenting his claim in court and securing an adjudication therein.

Wherefore, the said Ly Shew, as guardian ad litem of Ly Moon, a minor, prays judgment on behalf of said minor against the defendant for a judgment and the declaration of this Court adjudging and declaring the said minor to be a citizen and a national of the United States, and, as such national and citizen, entitled to enter into the United States and reside therein; and for such other and further relief as may be meet and proper in the premises.

/s/ STANLEY J. GALE,  
Attorney for Petitioner.

[Endorsed]: Filed November 8, 1950.

[Title of District Court and Cause.]

No. 30159

### ANSWER

Comes now Dean Acheson, Secretary of State of the United States, defendant in the above-entitled action, by and through his attorneys, Frank J. Hennessy, United States Attorney, and Edgar R. Bon-sall, Assistant United States Attorney, and in answer to plaintiff's complaint admits, denies, and alleges as follows:

#### I.

Defendant admits that Ly Shew is a citizen of the United States but denies that Ly Moon is the true and lawful son of Ly Shew. Defendant has no knowledge, information or belief as to the other allegations contained in paragraph I of the complaint and therefore denies the same.

#### II.

Defendant has no knowledge, information or belief as to the allegations contained in paragraph II of the complaint and therefore denies the same.

#### III.

Defendant has no knowledge, information or belief as to the allegations contained in paragraph III of the complaint and therefore denies the same.

#### IV.

Defendant has no knowledge, information or belief as to the allegations contained in paragraph IV of the complaint and therefore denies the same.



## V.

Defendant has no knowledge, information or belief as to the allegations contained in paragraph V of the complaint and therefore denies the same.

## VI.

Defendant has no knowledge, information or belief as to the allegations contained in paragraph VI of the complaint and therefore denies the same.

## VII.

Defendant admits that he is the duly appointed, qualified and acting Secretary of State of the United States, and further admits the other allegations contained in paragraph VII of the complaint.

## VIII.

Defendant has no knowledge, information or belief as to the allegations contained in paragraph VIII of the complaint and therefore denies the same.

## IX.

Defendant admits that the complaint herein constitutes an action seeking a judgment declaring the plaintiff to be a national of the United States.

Wherefore, defendant prays that each and every relief sought by plaintiff be denied; that this Court declare a judgment in favor of the defendant that plaintiff has never been a citizen or national of

the United States, and that defendant recover his proper costs against the plaintiff in this action.

/s/ FRANK J. HENNESSY,  
United States Attorney.

/s/ EDGAR R. BONSALE,  
Assistant United States Attorney, Attorneys for  
Defendant.

[Endorsed]: Filed January 11, 1951.

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[Title of District Court and Cause.]

Civil No. 30159

### AMENDED COMPLAINT AS OF COURSE

Comes Now Ly Shew, as guardian ad litem of Ly Moon, a minor, and as of course amends his complaint on file herein by withdrawing all of the allegations contained in paragraph II of said complaint and in the place and stead of the said paragraph II alleges as follows:

#### I.

That the said Ly Shew, prior to his first entrance into the United States, contracted a valid and lawful marriage in accordance with the marriage customs and ceremonies there recognized and prevailing, with Chin Shee, on February 22, 1912, at the Yung Sing Lay Village, Toyshan District, Kwangtung (Canton) Province, China. That the said Ly Shew and Chin Shee were, and are at all times

mentioned herein, husband and wife, and the natural blood parents of the said Ly Moon.

That as a result of the said marriage, there was born to the said Chin Shee and the said Ly Shew, as the lawful issue thereof, a son named Ly Moon, on or about October 18, 1933, in the Jung Sing Hung Village, Toyshan District, Kwangtung Province (Canton) China, which said son is the petitioner upon whose behalf this action is brought.

That the said Ly Shew and the said Chin Shee are also the parents of other children born as a result of said marriage.

Dated: July 20, 1951.

/s/ STANLEY J. GALE,  
Attorney for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed July 22, 1951.

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[Title of District Court and Cause.]

No. 30159

### AMENDED ANSWER

Comes Now Dean Acheson, Secretary of State of the United States, defendant in the above-entitled action, by and through his attorneys, Chauncey Tramutolo, United States Attorney, and Edgar R. Bonsall, Assistant United States Attorney, and in answer to plaintiff's complaint, admits, denies, and alleges as follows:

## I.

Defendant admits that Ly Shew is a citizen of the United States but denies that Ly Moon is the true and lawful son of Ly Shew. Defendant has no knowledge, information, or belief as to the other allegations contained in paragraph I of the complaint and therefore denies the same.

## II.

Defendant has no knowledge, information or belief as to the allegations contained in paragraph II of the complaint and therefore denies the same.

## III.

Defendant has no knowledge, information or belief as to the allegations contained in paragraph III of the complaint and therefore denies the same.

## IV.

Defendant has no knowledge, information or belief as to the allegations contained in paragraph IV of the complaint and therefore denies the same.

## V.

Defendant has no knowledge, information or belief as to the allegations contained in paragraph V of the complaint and therefore denies the same.

## VI.

Defendant has no knowledge, information or belief as to the allegations contained in paragraph VI of the complaint and therefore denies the same.

## VII.

Defendant admits that he is the duly appointed, qualified and acting Secretary of State of the United States, and further admits the other allegations contained in paragraph VII of the complaint.

## VIII.

Defendant has no knowledge, information or belief as to the allegations contained in paragraph VIII of the complaint and therefore denies the same.

## IX.

Defendant admits that the complaint herein constitutes an action seeking a judgment declaring the plaintiff to be a national of the United States.

## X.

Defendant affirmatively asserts that this Court is without jurisdiction of the subject matter of this action in that the plaintiff has never been denied a right or privilege as a national or citizen of the United States as required by Title 8 USCA 903 (Section 503 of the Nationality Act of 1940) under which this action was filed.

## XI.

Defendant affirmatively asserts that the plaintiff does not have a valid cause of action pursuant to Section 503 of the Nationality Act of 1940 in that the plaintiff has failed to exhaust his administrative remedies as the plaintiff's birth was not recorded with an American Consul abroad as provided for by Title 22 CFR 109.12; and further that

the plaintiff's application for documentation as a United States citizen has never been denied by American Consulate General abroad nor has he appealed to the Secretary of State, Washington, D.C.

Wherefore, defendant prays that each and every relief sought by plaintiff be denied; that this Court declare a judgment in favor of the defendant that plaintiff has never been a citizen or national of the United States, and that defendant recover his proper costs against the plaintiff in this action.

/s/ CHAUNCEY TRAMUTOLO,  
United States Attorney,

By /s/ EDGAR R. BONSALL,  
Assistant United States Attorney, Attorneys for  
Defendant.

[Endorsed]: Filed August 24, 1951.

In the District Court of the United States for the  
Northern District of California, Southern Division

Civil No. 31161

LY SHEW, as Guardian Ad Litem of LY SUE  
NING, a Minor,

Plaintiff,

vs.

THE HONORABLE DEAN ACHESON, as Sec-  
retary of State of the United States,

Defendant.

PETITION FOR DECLARATORY JUDGMENT  
UNDER SEC. 503 OF THE NATIONALITY  
ACT OF 1940

Comes Now Ly Shew, as guardian ad litem of  
Ly Sue Ning, a minor, and seeking declaratory re-  
lief and judgment on behalf of said minor, com-  
plains and alleges as follows:

I.

That the said Ly Shew is the natural blood  
father of the minor herein and is a citizen of the  
United States and was first admitted to the United  
States as a citizen on July 15, 1912, at the time of  
his entrance at the Port of San Francisco, Califor-  
nia, ex SS "Korea" and that as evidence of his  
citizenship, affiant has been issued Certificate of  
Identity No. 8216 by the Immigration and Naturali-  
zation Service of the United States.

That since the date of his first entrance into the

United States, as a citizen thereof, and at the time of the birth of his daughter, Ly Sue Ning, and at the present time, the said Ly Shew has been and now is a permanent resident of the City and County of San Francisco, State of California, within the jurisdiction of the District Court of the United States in and for the Northern District of California.

## II.

That the said Ly Shew, prior to his first entrance into the United States, contracted a valid and lawful marriage with Chin Shee, at the Yung Sing Lay Village, Toyshan District Kwangtung (Canton) Province, China, in accordance with the marriage customs and ceremonies there recognized and prevailing, on February 22, 1912; that as a result of the said marriage, there was born to the said Chin Shee and the said Ly Shew, as the lawful issue thereof, a daughter named Ly Sue Ning, on or about January 26, 1937, in the Chung Sim Hung Village, Toishan District, Kwangtung (Canton) China, which said daughter is the petitioner upon whose behalf this action is brought.

That affiants daughter, the said Ly Sue Ning, is also known as Ly Shue Ning.

That the said Ly Shew and the said Chin Shee are also the parents of other children born as a result of the said marriage.

## III.

That the said marriage and the details thereof was duly reported to the United State Immigration



and Naturalization Service upon the occasion of affiant's original entry into the United States, through the Port of San Francisco, in 1912. That the birth of his said daughter, Ly Sue Ning, was not reported to the United States Immigration and Naturalization Service because of the fact that the said Ly Sue Ning, daughter of affiant herein, was born after said affiant's last return trip to the United States from China.

#### IV.

That the said Ly Sue Ning, a minor, is a citizen of the United States under the provisions of Sec. 1993 of the revised statutes of the U. S. (8 USCA 6) and Secs. 101 and 504 of the Nationality Act of 1940 (54 Stat. 1137; 8 USCA 907).

#### V.

That the said Ly Sue Ning, a minor, now temporarily resides at No. 16 Wai Chong Street, first floor, Yammati, Kowloon, in the British Crown Colony of Hong Kong, and the said Ly Sue Ning, a minor, hereby claims the City and County of San Francisco, State of California, as her permanent residence.

#### VI

That for over two (2) years last past, the said minor has presented various and sundry applications to the American Consul at Hong Kong for permission to enter the United States as a citizen thereof and/or for the purpose of having her claim to citizenship passed upon and adjudicated by the

Immigration and Naturalization Service of the United States, and despite said repeated applications, the said minor has been unable to secure a visa, permit or permission to travel to and enter the United States from the said American Consul, and, the said American Consul has refused to grant said application, visa, or permit to travel to the United States, stating that the reason for his refusal was that the said applicant had failed to present satisfactory proof of her American citizenship; that the refusal of the said American Consul to issue the requested documentation aforesaid, was oral.

#### VII.

That the Honorable Dean Acheson, defendant herein, as Secretary of State of the United States, is the duly qualified, authorized and acting administrative head of the Department of State of the United States and in such capacity is in charge of the various United States Consuls and Consulates, including the United States Consulate located in the British Crown Colony of Hong Kong, and as the administrative head of such department, is responsible for and controls the administrative functions of the said United States Consul; and that the said American Consul in the British Crown Colony of Hong Kong is the official representative of and subject to the orders and direction of the defendant herein.

#### VIII.

That the said Ly Sue Ning, a minor, has never committed any act or executed any document of

repatriation nor renounced her United States citizenship and has always considered herself to be and declared herself to be a citizen of the United States and it has always been the intention of the said minor to come to the United States, the country of her citizenship, and it has always been the intention of said minor to keep and maintain her domicile and residence within the said United States and in this behalf, the said minor claims residence and domicile within and in the Northern District of California and more particularly within the jurisdiction of this Court.

### IX.

That under the provisions of Sec. 503 of the Nationality Act of 1940 (54 Stat. 1171-1172; 8 USCA 903), the said minor is entitled to prosecute and maintain an action in this Court declaring her to be a national of the United States, and under the provisions of such Act, she is entitled to proceed to and enter the United States for the purpose of presenting her claim in court and securing an adjudication therein.

Wherefore, the said Ly Shew, as guardian ad litem of Ly Sue Ning, a minor, prays judgment on behalf of said minor against the defendant for a judgment and the declaration of this Court adjudging and declaring the said minor to be a citizen and a national of the United States, and, as such national and citizen, entitled to enter into the United States and reside therein; and for such

other and further relief as may be meet and proper in the premises.

/s/ STANLEY J. GALE,  
Attorney for Petitioner.

Duly verified.

[Endorsed]: Filed January 11, 1952.

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[Title of District Court and Cause.]

Civil No. 31161

### ANSWER

Comes now Dean Acheson, Secretary of State of the United States, defendant in the above-entitled action, by and through his attorneys, Chauncey Tramtolo, United States Attorney and Edgar R. Bon-sall, Assistant United States Attorney, and in answer to plaintiff's Complaint, admits, denies and alleges as follows:

#### I.

Answering Paragraph I of the Complaint, defendant denies that plaintiff Ly Sue Ning is the true and lawful blood child of Ly Shew. Defendant has no knowledge, information or belief as to the other allegations contained in Paragraph I of the Complaint and therefore denies the same.

#### II.

Answering Paragraph II of the Complaint, defendant has no knowledge, information or belief as

to the allegations contained in Paragraph II of the Complaint and therefore denies the same.

### III.

Answering Paragraph III of the Complaint, defendant has no knowledge, information or belief as to the allegations contained in Paragraph III of the Complaint and therefore denies the same.

### IV.

Answering Paragraph IV of the Complaint, defendant denies that Ly Sue Ning is a citizen of the United States under the provisions of Section 1993 of the United States Revised Statutes and Sections 101 and 504 of the Nationality Act of 1940 and affirmatively asserts that the plaintiff is an alien and citizen of China.

### V.

Answering Paragraph V of the Complaint, defendant has no knowledge, information or belief as to the allegations contained in Paragraph V of the Complaint and therefore denies the same.

### VI.

Answering Paragraph VI of the Complaint, defendant has no knowledge, information or belief as to the allegations contained in Paragraph VI of the Complaint and therefore denies the same.

### VII.

Answering Paragraph VII of the Complaint, defendant admits that he is the duly qualified and act-

that the American Consulate General at Honk Kong  
ing Secretary of State of the United States and  
is an official executive of the defendant herein.

### VIII.

Answering Paragraph VIII of the Complaint, defendant has no knowledge, information or belief as to the allegations contained in Paragraph VIII of the Complaint and therefore denies the same.

### IX.

Answering Paragraph IX of the Complaint, defendant denies that Ly Sue Ning is entitled to prosecute and maintain an action in this Court to declare her to be a national of the United States and denies that under the provisions of such act she is entitled to proceed to and enter the United States for the purpose of presenting her claim in Court and securing an adjudication therein. Defendant affirmatively asserts that plaintiff has no right under the statutes cited to proceed to and enter the United States and that this Court is without authority to direct the defendant to permit her to do so.

### First Affirmative Defense

Defendant affirmatively asserts that he does not concede the American citizenship of any of the plaintiff's alleged ancestors and specifically denies that plaintiff is the blood child of Ly Shew. Defendant further alleges that plaintiff is not a citizen of the United States but is, in fact, an alien.

## Second Affirmative Defense

That under Section 503 of the Nationality Act of 1940 (8 USCA 903) this Court is without venue and therefore without jurisdiction of the subject matter of this suit for the reason that the Complaint fails to show that plaintiff has a bona fide claim of permanent residence in this District.

Wherefore, defendant prays each and every relief sought by the plaintiff be denied; that this Court declare a judgment in favor of defendant that plaintiff has never been a citizen of the United States; and that the defendant recover his proper costs against the plaintiff in this action.

/s/ CHAUNCEY TRAMUTOLO,  
United States Attorney,

/s/EDGAR R. BONSALL,

Assistant United States Attorney, Attorneys for  
Defendants.

[Endorsed]: Filed March 3, 1952.

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[Title of District Court and Cause.]

No. 30159

ORDER GRANTING MOTION FOR  
PHYSICAL EXAMINATION

The defendant having moved, pursuant to Rule 35 of the Federal Rules of Civil Procedure, for an order directing the plaintiff herein and his alleged

father to submit to a physical examination, including blood grouping tests, and it appearing to the Court that such tests, if made under proper conditions by persons competent to make and evaluate such tests, may have probative value to disprove, but not to prove paternity and thus may be admissible on a trial on the merits if the trial court should find that the question of paternity is legally in issue, and it further appearing to the Court that such blood grouping tests may properly be ordered under said Rule 35 (see *Beach v. Beach*, 114 F. 2d 479), it is by the Court

Ordered that the defendant's said motion for an order directing the plaintiff herein and his alleged father to submit to a physical examination, including blood grouping tests, be and the same hereby is granted and defendant is directed to prepare an order in conformance with the provisions of said Rule 35.

Dated: August 27, 1952.

/s/MICHAEL J. ROCHE,  
Chief United States  
District Judge.

[Endorsed]: Filed August 27, 1952.



[Title of District Court and Cause.]

No. 31161

ORDER GRANTING MOTION FOR  
PHYSICAL EXAMINATION

The defendant having moved, pursuant to Rule 35 of the Federal Rules of Civil Procedure, for an order directing the plaintiff herein and her alleged father to submit to a physical examination, including blood grouping tests, and it appearing to the Court that such tests, if made under proper conditions by persons competent to make and evaluate such tests, may have probative value to disprove, but not to prove paternity and thus may be admissible on a trial on the merits if the trial court should find that the question of paternity is legally in issue, and it further appearing to the Court that such blood grouping tests may properly be ordered under said Rule 35 (see *Beach v. Beach*, 114 F. 2d 279), it is by the Court

Ordered that the defendant's said motion for an order directing the plaintiff herein and her alleged father to submit to a physical examination, including blood grouping tests, be and the same hereby is granted and defendant is directed to prepare an order in conformance with the provisions of said Rule 35.

Dated: August 27, 1952.

/s/ MICHAEL J. ROCHE,  
Chief United States  
District Judge.

[Endorsed]: Filed August 27, 1952.

[Title of District Court and Cause.]

Nos. 30159 and 31161

## OPINION

Goodman, District Judge.

These are two suits, among hundreds, filed in this court by persons of Chinese ancestry, pursuant to Section 503 of the Nationality Act of 1940 (8 USC 903), seeking judgment declaring plaintiffs to be nationals of the United States. Ly Moon, plaintiff in No. 31059, aged approximately seventeen years at the time of the filing of the complaint herein, and Ly Sue Ning, plaintiff in No. 31161, aged approximately fifteen years, both claim to be the blood children of one Ly Shew, the latter admittedly a male citizen of the United States by derivation. Yy Moon alleges that he was born in China, the son of Ly Shew and one Ly Chin Shee, on or about October 18, 1933; Ly Sue Ning alleges that she is the daughter of Ly Shew and Ly Chin Shee, born in China on or about January 26, 1937. Neither has ever been in the United States except for the immediate purpose of prosecuting these actions. Both claim United States citizenship by virtue of Section 1993 of the Revised Statutes<sup>1</sup> which bestowed citizenship upon foreign-born children of citizen fathers. Ly Moon's

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<sup>1</sup>Sec. 1993. All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth, citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

claim does arise under Section 1993 because that statute was effective at the time of his birth. But Section 1993 was amended in 1934, prior to Ly Sue Ning's birth, by the Act of May 24, 1934, 48 Stat. 797.<sup>2</sup> The amendment provided that United States citizenship should not descend to a foreign-born child of a citizen father until the child had resided in the United States for five years continuously preceding his eighteenth birthday. Ly Sue Ning has not and could not now meet that condition. Her claim to citizenship must rest upon Sections 201(g) and (h) of the Nationality Act of 1940, 8 USC 601(g), (h),<sup>3</sup> which supersede Section 1993 of the Revised

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<sup>2</sup>Sec. 797. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization.

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<sup>3</sup>(g) A person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence, at least five of which were after attendance in the United States or one of its outlying

Statutes. These Sections of the Nationality Act retroactively vest United States citizenship in a citizen's child born abroad after May 24, 1934, the effective date of the amendment to Section 1993, subject to divestment if the child does not reside in the United States for a period totaling five years between the ages of thirteen and twenty-one.

The testimony at the trial, which lasted three days, was entirely given in the Toy Shan Chinese dialect and interpreted into English. Neither Ly Shew, the alleged father, nor the plaintiffs, nor the witnesses in behalf of plaintiff, could speak a word of English.

Many time the interpreter carried on extensive dialogues with the witnesss before obtaining a response to a question propounded. Inconsistencies and contradictions in testimony became manifest. To fairly determine their effect is difficult, if not im-

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taining the age of sixteen years the other being an alien: Provided, That, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: Provided further, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years his American citizenship shall thereupon cease.

(h) "The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934. . . ."

possible. Familiar as we are in this court with Chinese-interpreted testimony, it can be categorically stated that it is well-nigh impossible to determine the creditibility of such witnesses. At least, after ten years of constant trial work, I find it so. Against this unsatisfactory evidentiary background the following general picture has emerged:

Ly Shew, the alleged father of plaintiffs, was admitted to the United States in July of 1912, as a citizen. His citizenship was derived from his father by virtue of the citizenship of the latter. Ly Shew claims to have been, since his entrance into the United States and up to the time of the trial of the cases, a permanent resident of the City and County of San Francisco, State of California, in this District, making his livelihood here. During the course of the years following his entry into the United States, he made several trips to China. On the occasion of one of these trips in 1932, he claims to have married one Ly Chin Shee in the Toy Shan District, Kwan Tung Province, Canton, China. It does not appear that any marriage, according to Western standards was had, but that a declaration or acknowledgment of some kind, the nature of which is obscure, took place. He claims that in the following year, 1933, plaintiff Ly Moon was born and that on a subsequent visit to China in 1937, the plaintiff Ly She Ning was born. He never engaged in any business in China, going there, as he said, to "rest and visit." His permanent residence was always in San Francisco. It may be said, without in any way in-

tending to be facetious, that the main object of his visits to China was for the purpose of procreation. There is testimony that some money was sent to China by Ly Shew from San Francisco to his alleged wife.

As to the paternity of plaintiffs, the government did not and obviously could not present any evidence. For the area within Communist China, wherein plaintiffs claim to have been born and wherein the alleged mother is said to be, and wherein plaintiffs claim to have lived their entire lives, has long been closed to any opportunity for investigation or verification. Thus the only recourse of the defense was to cross-examine the witnesses.

The first, and, indeed the essential requisite to a just decision here, is to determine what standards should be applied in weighing and appraising the evidence offered in behalf of plaintiffs. For these and companion cases are not orthodox adversary suits. Despite the fact that the Secretary of State is party defendant, in every real sense, the people of the United States are defendants. This court is called upon to declare the nationality of plaintiffs. Hence the paramount necessity of an adequate legal yardstick with which to measure the evidence.

Proper selection of standards requires a preliminary consideration of certain historical background. As well it requires an analysis of the statutory history and purpose. And also there is needed an understanding of the unique problem posed by the hundreds of similar cases now before the court.

First as to historical background.

After the discovery of gold in California, a huge number of Chinese immigrants came to the United States, particularly to California. This mass immigration eventually resulted in the enactment of the Chinese Exclusion Acts<sup>4</sup> in 1882, for by that time over 200,000 Chinese had come principally to California. These Acts were, from time to time, extended by successive statutes. They remained in existence until December 17, 1943,<sup>5</sup> when all the Exclusion Acts were repealed. Simultaneously with repeal of the Acts, Chinese were made eligible for immigration and naturalization and an annual quota of 105 was established. 57 Stat. 600.

During the years prior to 1943, thousands of American males of Chinese ancestry, being unable, it is asserted, to find spouses in this country, made periodic visits to China and begot offspring. Up until the effective date of the Nationality Act of 1940, Act of Oct. 14, 1940, 8 USC 501 et seq., there was no specific statutory provision which entitled persons living abroad and claiming United States nationality to have their nationality decreed by court order. So up to that time, American males of Chinese ancestry, who had begotten offspring on visits to China and desired to have the American nationality of such offspring established, as provided, since 1855, by §1993 Revised Statutes, and, since 1934, by 48 Stat. 797, caused such offspring to come to the

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<sup>4</sup>22 Stat. 58.

<sup>5</sup>7 Stat. 600.

United States and they were either admitted by Immigration as United States nationals or denied admission. If any further recourse was sought, it was by way of habeas corpus in federal courts to review Immigration administrative decision. Upon such review, as is now well known, the limit or judicial inquiry was whether the administrative proceedings had afforded due process.

As to the history and purpose of §903.

8 USC 903,<sup>6</sup> authorizing judgments declaratory

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<sup>6</sup>§903. If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be



of United States citizenship, became effective as a part of the Nationality Act of 1940 on January 13, 1941. But the first Chinese suit under §903 was not commenced until August, 1947. *Mah Yung Og vs. McGrath*, D.C. 187 Fed. 2d 199. And in this District the first Chinese case under §903 was filed June 29, 1949. Two more were filed in the same year. In 1950, 22 additional cases were filed. In 1951, 161 cases were filed. Then came the deluge. By the close of business on December 24, 1952,<sup>7</sup> there were on

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denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. Oct. 14, 1940, c. 876, Title I, Subchap. V, §503, 54 Stat. 1171.

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<sup>7</sup>By the provisions of the Immigration and Nationality Act of 1952 (McCarran Act) effective December 24, 1952, the remedy of court action granted by former Section 903 is available only to persons who have resided in the United States. Immigration and Nationality Act of 1952 §360(a). Thus none of the suits now pending in this District could be maintained under the present statute, for none of the plaintiffs have ever resided in the United States. There is a possibility, somewhat remote, that the savings clause of the McCarran Act, §405 (a), may permit the filing of some suits under old Section 903, in cases of the vesting of rights prior to the effective date of the McCarran Act. 12, 1952 Congressional & Administrative News, p. 2706.

file in this District a total of 716 cases. By the same date, 189 cases had been filed in the Southern District of California, a grand total of 905 cases in both California Districts. As near as may be presently ascertained, a total of 1288 cases (including the California suits) have been commenced in the United States. Of the non-California cases, 9 were filed in the District of Oregon and 61 in the Western District of Washington. Thus 75% of all cases are to be determined in this District.

It has been blithely assumed that plaintiffs, who never have been in the United States and who have lived their lives as Chinese, have the status and right to avail themselves of §903. Let us see, by studying Congressional proceedings and examining the language of the statute and its relation to the Nationality Code, whether this is so.

First of all it should be observed that Section 903 is a part of Subchapter V of the Nationality Code of 1940, which immediately follows Subchapter IV, dealing with the subject of expatriation or loss of nationality. The many new grounds for expatriation created by Subchapter IV prompted the Congress to afford a means of protection for persons abroad charged with being expatriates. While the opening words of Section 903 broadly state that "any person" denied a right of citizenship may seek a declaratory judgment, it is clear that the section was designed primarily to protect those who might run afoul of the expatriation provisions of Subchapter IV. See 86 Congressional Record 13247-48. Section 903 permits such persons to sue in a Fed-

eral District Court, whether "within the United States or abroad."

The Congressional proceedings, plus the place of Section 903 in the Nationality Code, persuasively indicate that, in enacting that Section, the Congress never contemplated that it should be available of by persons who never have been in the United States and against whom no charge of expatriation has been made. That the issue of expatriation was the basis upon which the Congress afforded the judicial remedy to those abroad is further manifest by the provision in Section 903 that a "certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States."

There is no doubt about the Congressional intent to allow any person in the United States to bring suit under Section 903, if any of his rights or privileges as a citizen are denied. But as to those abroad, the objective of the statute is clearly in aid of those charged with expatriation. There is not the slightest evidence that the Congress ever intended Section 903 to encompass a declaratory proceeding to determine the identity of claimants such as plaintiffs.

The real purpose and intent of §903 is pointed out, not because the court intends to rest decision upon an interpretation of the statutory meaning, but to emphasize the need for careful scrutiny of these and like causes. For it appears that in not one single case of the 716 pending is the issue of expatriation tendered. In each case the issue to be

determined is that of identity, namely, who is the person who makes the claim of United States Nationality?

As to the special problem of the 716 cases.

In the Southern District of California, in the case of *Mar Gong vs. McGranery*, decided Dec. 15, 1952, Judge Westover, who has tried approximately 20<sup>8</sup> of the 189 cases on file in that District, calls attention to the "mutuality" of the facts in the cases of these Chinese born plaintiffs. He points out that: (1) the alleged father is a citizen by derivation; (2) the father returns to the ancestral village to marry; (3) a child is born within a year; (4) the father returns to the United States after the wife has conceived a second time; (5) other children are conceived, in some cases, upon subsequent visits to China; (6) when the children are in midteens, they apply to come to the United States; (7) usually the last-born child is not seen by the father until arrival in the United States; (8) each visit to China produces another "crop" of sons; (9) apparently there is no impotence, because every visit to China result in offspring; (10) the offspring are preponderantly male; (11) the offspring are all born in an unknown rural village, where the homes and villages are described as being alike; (12) there are no doctors, only midwives; (13) all offspring survive and are strong and healthy.

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<sup>8</sup>Besides the instant causes, I have heard the cases of four other plaintiffs and am this day filing decisions as to them.

Substantially most of what Judge Westover says applies to the cases in this District.

It is well to consider these matters, because of the amount of judicial time which may be required to dispose of these causes. We have estimated that it will take the full time of one of the judges of this court 8 years to try and dispose of the cases. And if all seven judges of the court were to devote all their time to their disposition, it would require over one year to clear the calendar of the §903 cases.

The government has contended that the records of the State Department show that many of the applications for certificates of identity made to consular officers in Hong Kong (the only consular office now functioning in continental China) are fraudulent. It further points out the impossibility of checking the identity of the applicants.

A survey of the 716 cases here shows that 95% of the plaintiffs claim to have been born in Kwang Tung Province and 62% in the Toy Shan District of Kwang Tung Province. The villages alleged to be the places of birth are unknown to United States authorities and cannot be located on available maps.

An examination of 354 of the 716 complaints shows 367 of the plaintiffs to be males and 39 to be female. (More than one plaintiff is joined in some complaints.)

The Department of Justice has made an examination of 317 suits filed elsewhere in the United States. Statistics revealed in these suits show that among the families concerned in these 317 suits, 1215 male children were born as against 169 female. The De-

partment of Justice also reports that a survey made in Hong Kong recently reveals that of 149 applicants for certificates of identity, there was a ratio of 9 to 1 male births.

Statistics recently collected by the State Department from applications for certificates of identity filed in Hong Kong show that a preponderance of applicants claim birth on the day of the month corresponding to the number of the month, for example 2nd day of the 2nd month of the Chinese calendar. The government contends that this is indicative of fraud in that the dates are selected to make them easy to memorize.

In this district between the years 1947 to 1950 inclusive, there were 53 criminal prosecutions against Chinese for false claims of citizenship due to falsified birth certificates or travel documents. This is exclusive of a great many cases not prosecuted because of lack of evidence of criminal intent.

Consideration of these factors and circumstances does not mean that the court is conducting an investigation for the purpose of summarily disposing of all these cases. They are related solely in order to furnish some guide and aid in the judicial process of evaluating testimony offered to support claims to the priceless right of American citizenship. For each one of these cases requires the determination of the identity of the claimant to citizenship. And such identity rests upon evidence given in a foreign language as to birth, in an inaccessible foreign area, of persons born and living

under a completely foreign culture, with no means of investigation or verification open to the people of the United States, who are vitally concerned. Furthermore, it is a foreign culture, which does not generally recognize ethical demands beyond family loyalty.<sup>9</sup>

The plaintiffs have alleged in their complaint that they have always considered themselves to be citizens of the United States and that it has always been their intention to come to United States and further that it has always been their intention to keep and maintain their domicile and residence in the United States. But the evidence indisputably shows this to be untrue. To the contrary, the evidence shows these minor children to be Chinese in every sense of the word. They know, and knew, nothing about the United States except that their alleged father seeks to bring them here. And they come in compliance with that filial dictate.

Standards to be applied in weighing the testimony.

A proceeding under §903 is a primary and original action. In my opinion, it is not a *de novo* proceeding, as has been stated. For to denominate a suit as *de novo* means that there has been some other proceeding concerning the same issue, but that the instant cause is being heard independent of such prior proceeding.

But whether the suit be primary or *de novo*, the

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<sup>9</sup>See F. S. C. Northrup, *The Taming of the Nations*, MacMillan 1952; also Lin Yutang, *My Country and My People*, John Day, N. Y. 1939.

burden of proving plaintiffs' identity rests upon plaintiffs. Particularly is this so when the burden is to prove claimants' United States citizenship. Upon review of immigration proceedings where entry into the United States was sought by Chinese applicants upon the ground that the applicants were United States citizens, it has been held that the burden of proving applicants to be children of American citizens rested upon applicants. *Wong Ying Loon vs. Carr*, 9 Cir. 108 F. 2d 91; *Yee Suey vs. Ward*, 1 Cir. 104 F. 2d 900; *Ex parte Lee Fong Fook*, 74 Fed. Supp. 68.

It would seem beyond question that a similar burden rests upon plaintiffs here.

Against the background of considerations described *supra*, what is the nature and extent of the burden of proof of plaintiffs?

Plaintiffs contend that they have made a *prima facie* case, that the burden of going forward consequently shifted to the defense, that since the defense presented no evidence, it failed to carry its burden, ergo, judgment should go for plaintiffs. Such reasoning begs the question as to what constitutes a *prima facie* case in this sort of proceeding. Whether or not the showing made is *prima facie* depends upon the nature and extent of the burden of proof.

The burden of proof resting upon plaintiffs is to show that they are persons who, because of their identity, are entitled to be judicially declared to be American citizens.

This brings us to a consideration of what degree



of proof is necessary in order to establish their identity.

Constitutionally, only those born or naturalized in the United States and subject to the jurisdiction thereof, are citizens. Const. Amdt. XIV. The power to fix and determine the rules of naturalization is vested in the Congress. Const. Art. I, sec. 8, Cl. 4. Since all persons born outside of the United States, are "foreigners,"<sup>10</sup> and not subject to the jurisdiction of the United States, the statutes, such as §1993 and 8 USC 601, derive their validity from the naturalization power of the Congress. *Elk vs. Wilkins*, 112 U. S. 94, 101; *Wong Kim Ark vs. U. S.* 169 U. S. 649, 702, (1898). Persons in whom citizenship is vested by such statutes are naturalized citizens and not native-born citizens. *Zimmer vs. Acheson*, 191 F. 2d 209, 211 (10 Cir. 1951); *Wong Kim Ark vs. U. S.* *supra*.

While under §903, the courts are not granted the jurisdiction to "admit" to citizenship, as under the naturalization statutes, the jurisdiction to "declare" citizenship by naturalization pursuant to §903 is substantially equivalent. This is so because under §903, a decree favorable to petitioner in effect "makes" petitioner a citizen, whereas an unfavorable decree requires deportation to the foreign land of birth. Consequently, in my opinion, a decree declaring citizenship by naturalization is in all respects the same as a decree admitting to citizenship.

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<sup>10</sup>See *Boyd vs. Nebraska ex rel Thayer*, 143 U. S. 135; *U. S. vs. Harbanuk*, 1 Cir. 62 F. 2d 759, 761.

Indeed, the consequences of denying the prayer of petitioners here are much more dire than those resulting from denying petitions for naturalization, for in the latter case the petitioners may remain, in most cases, in the United States, while in the former, the result is deportation.

The degree of proof therefore, required of plaintiffs, should be of substantive parity with that required of petitioners for naturalization.

It has been the rule in naturalization cases that an applicant for citizenship has the burden of convincing the court by satisfactory evidence that he is entitled to citizenship.<sup>11</sup> And that burden never shifts to the government.<sup>12</sup> In the reverse process of denaturalization, the rule is that citizenship may not be annulled except by clear, unequivocal and convincing evidence.<sup>13</sup>

Where entry into the United States is sought upon the basis of the entrant's claim to United States citizenship, the rule is that the proof of alleged citizenship must be clear and convincing.<sup>14</sup>

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<sup>11</sup>U.S. v. Schwimmer, 279 U.S. 644, 649 (1929); Tutun v. U.S. 270 U.S. 568, 578 (1926); U.S. v. Macintosh, 283 U.S. 605 (1931); In re Laws, 59 Fed. Supp. 179 (N.D.Cal.) (1944); Petition of Boric, 61 Fed. Supp. 133, 136 (Ore. 1945); Petition of Sam Hoo, 63 Fed. Supp. 439 (N.D.Cal.) (1945).

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<sup>12</sup>See cases cited in Note #11.

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<sup>13</sup>Schneiderman v. U.S. 320 U.S. 118 (1943); Baumgarten v. U.S. 322 U.S. 665 (1944).

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<sup>14</sup>Lee Sim v. U.S. 218 Fed. 432, 435 (2 Cir. 1914); Ex parte Chin Him, et al. 227 Fed. 131, 133 (W.D. N.Y. 1915).

Clear and convincing proof is a standard frequently imposed in civil cases where the wisdom of experience has demonstrated the need for greater certainty.<sup>15</sup> This high standard may be required to sustain claims which have serious social consequences or harsh or far-reaching effects on individuals.<sup>16</sup> To justify an exceptional judicial remedy<sup>17</sup> or to circumvent established legal safeguards,<sup>18</sup> the proof must usually meet this standard. Instruments which have established legal rights and warrant great reliance may not be contradicted except

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<sup>15</sup>IX Wigmore on Evidence § 2498 at page 329 (3rd Ed. 1940); 32 Corpus Juris Secundum, Evidence § 1023, (1924); 20 American Jurisprudence, Evidence §§ 1252-53 (1939).

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<sup>16</sup>Eg. Note, 128 A.L.R. 713 (1940) (degree of proof to establish the illegitimacy of children born in wedlock); Note, 13 Minnesota Law Review 580 (1929) (proof of adultery in divorce actions); Note, 12 A.L.R. 2d 153 (1950) (showing necessary for rescission of divorce decree after remarriage); Commissioner v. Ryan, 238 App. Div. 607, 265 N.Y.S. 286 (1933) (proof in filiation proceeding); Johnson v. Feskens, 146 Or. 657, 31 P. 2d 667 (1934) (proof to justify forfeiture under a contract); Dickson v. St. Louis & K.R.Co. 168 Mo. 90, 67 S. W. 642 (1902) (to divest title to real estate for breach of a condition subsequent).

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<sup>17</sup>Eg. 49 American Jurisprudence, Specific Performance § 169 (1943) (proof of the existence of a contract when specific performance is demanded).

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<sup>18</sup>Eg. 1. American Jurisprudence, Acknowledgment § 155 (1936) (to impeach an acknowledgment).

by this degree of proof.<sup>19</sup> As well, this standard is employed in cases where the opportunity for fraud and the temptation to perjury is great. Thus, this standard must be met to sustain certain claims which are easily fabricated and difficult to disprove, or which are evidenced merely by the oral testimony of interested witnesses as to events long past.<sup>20</sup>

The factors which have prompted the courts to exact a high standard of proof in other cases, are

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<sup>19</sup>36 Am. Jur., Mortgages §§ 134-35 (1941); Note, L.R.A. 1916B 192 (to show an absolute deed is a mortgage); 9 Am. Jur., Cancellation of Instruments § 63 (1937); 45 Am. Jur., Reformation of Instruments §§ 116-17 (1943); Note, 94 A.L.R. 1278 (1935) Note, 48 A.L.R. 1462 (1927); 117 A.L.R. 1022 (1938); (to justify reformation or rescission of a written instrument for fraud, mistake, or undue influence).

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<sup>20</sup>Eg. 57 Am. Jur., Wills §§ 981-83 (1948); (to prove a lost will); 57 Am. Jur., Wills § 728 (1948); Note, 69 A.L.R. 167 (1930) (to prove agreement to leave property to another); Note, 7 A.L.R. 2d 25 (1949) (proof of agreement for compensation for services rendered to a relative); 24 Am. Jur., Gifts § 133 (1933) (to prove a parol gift after the death of the donor); 54 Am. Jur., Trusts §§ 620-24 (1945); 23 A.L.R. 1500 (1923); (oral proof of an express trust in realty or personalty, or of facts giving rise to a resulting or constructive trust); *Furman v. St. Louis Union Trust Co.*, 338 Mo. 884, 92 S.W. 2d 726 (1936) (agreement to adopt as basis for sustaining right to inheritance); *The Barbed Wire Patent*, 143 U.S. 275 at 284 (1892) (to prove prior anticipatory use of an invention); *Commissioner v. Ryan*, 238 App. Div. 607, 265 N.Y.S. 286 (1933) (proof in filiation proceedings).

present to a great degree in these Section 903 cases. A judgment declaratory of the American citizenship of a person who has grown up in an alien culture and whose only claim to citizenship is based on heredity vitally affects the American people. All the rights and privileges of citizenship would be thereby vested in a person totally unprepared to exercise them.

Both the temptation and the opportunity for fraud is great in these cases. American citizenship is indeed a prize for those persons seeking to escape the misery of Communist China. A plausible claim is easily presented and virtually impossible for the government to meet. The facts to substantiate the claim rest almost entirely within the sole knowledge of interested persons.

The standard of clear and convincing proof, I hold, should be applied in all cases where an applicant invokes the judicial power to affirm a claimed right of United States citizenship by naturalization. It should be applied in these § 903 cases.

Since I find the evidence presented in support of plaintiffs' cause to be neither satisfactory nor clear nor convincing, they have not sustained their burden of proof and their prayer should be denied.

The Court does not find that the plaintiffs and their witnesses are not telling the truth. But rather I cannot tell whether they are or not. Their evidence has neither the satisfactoriness or clarity or convincing character that justifies, in effect, the conferring of American citizenship.

It may well be that Ly Shew is the father of the two plaintiffs. In denying the relief asked for in the complaint, I am not finding that he is not their father. I am denying the petition because the evidence does not meet the proper standards. In some respects it is so inconsistent as not to be credible. It may be said, and indeed was argued, that a decision adverse to the plaintiffs is cruel and that its effect is to separate a father from his children and to break up the home. The short answer is that the plaintiffs have always been with the alleged mother in China. Their home has always been there. The alleged father has rarely, if at all, seen the plaintiffs. In fact he never had seen the plaintiff Ly Sue Ning until she arrived in the United States. The father's permanent residence has always been in the United States. He has never had any home in China. For all practical purposes, the plaintiff children are strangers to him. So what is defeated by denial of relief here is not the family home but the effort to come into the United States.

During the trial, the government moved to strike certain statements of plaintiffs and their alleged father as to the alleged father's paternity. The statements were claimed to be admissible under the so-called "pedigree" exception to the hearsay rule. Upon the record, I see no need for resolving the claimed issue of law. I will allow the testimony to remain in the record. For I attach no weight to it. "The mere say-so of interested witnesses does not have to be accepted." *Flynn ex rel. Yee Suey v. Ward*, 104 F. 2d 902 (1 Cir. 1939).

We can well understand the desire of those who speak for plaintiffs to have them admitted and join the American Citizenry. In every sense, so far as I am concerned, this is "God's Country." But as a court, we are guardians and custodians of a precious fund. Every American citizen has the right to demand that we do not dispense the fund except to those who are unequivocally entitled to share in it. If we are satisfied to apply any lesser standards in these cases, we might just as well issue a rubber stamp decree admitting all the plaintiffs in the 716 suits filed in this district. But this would be a completely unbecoming judicial act and obviously I won't perform it.

Judgment for defendant upon findings to be presented pursuant to the Rules.

Dated: January 12, 1953.

[Endorsed]: Filed January 12, 1953.

In the United States District Court for the  
Northern District of California, Southern  
Division

No. 30159

LY SHEW, as Guardian ad Litem for Ly Moon,  
Plaintiff,

vs.

DEAN ACHESON, as Secretary of State,  
Defendant.

No. 31161

LY SHEW, as Guardian ad Litem of Ly Sue Ning,  
Plaintiff,

vs.

DEAN ACHESON, as Secretary of State,  
Defendant.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on for trial on the 2nd, 3rd and 4th days of September, 1952, and the 14th day of November, 1952, before the above-entitled Court, Honorable Louis E. Goodman presiding, Stanley J. Gale, Esq., appearing as attorney for the plaintiffs above named, and Chauncey Tramutolo, Esq., United States Attorney for the Northern District of California, and Charles Elmer Collett, Esq., Assistant United States Attorney for said district, appearing as attorneys for the defendant above-named; and the evidence having been received and the Court having fully considered the



same, and having filed herein its opinion, hereby makes the following Findings of Fact and Conclusions of Law.

### Findings of Fact

#### I.

It is not true that the persons who claim to be the plaintiffs herein have always considered themselves and declared themselves to be citizens of the United States; it is not true that they had always intended to come to the United States, and it is not true that it had always been their intention to keep and maintain a domicile and residence within the United States.

It is not true that the residence and domicile of said persons who claim to be plaintiffs is within the Northern District of California, or in the United States of America.

#### II.

The persons who claim to be plaintiffs have failed to introduce evidence of sufficient clarity to satisfy or convince this Court that Ly Shew is the natural blood father of persons known as Ly Moon and Ly Sue Ning, or that the persons who appeared before this Court claiming to be plaintiffs Ly Moon and Ly Sue Ning are in truth and fact Ly Moon and Ly Sue Ning.

### Conclusions of Law

The persons appearing before the Court as plaintiffs in this action are not entitled to the relief prayed for.

Let Judgment be entered accordingly.

Dated: This 28th day of January, 1953.

/s/ LOUIS E. GOODMAN,  
United States District Judge.

Lodged January 19, 1953.

[Endorsed]: Filed January 29, 1953.

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In the United States District Court for the  
Northern District of California, Southern  
Division

No. 30159

LY SHEW, as Guardian ad Litem, for Ly Moon,  
Plaintiff,

vs.

DEAN ACHESON, as Secretary of State,  
Defendant.

No. 31161

LY SHEW, as Guardian ad Litem for Ly Sue  
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Defendant.

### JUDGMENT

The above-entitled action came on for trial on  
the 2nd, 3rd and 4th days of September, 1952, and

the 14th day of November, 1952, before the above-entitled Court, Honorable Louis E. Goodman presiding, Stanley J. Gale, Esq., appearing as attorney for the plaintiffs above named, and Chauncey Tramutolo, Esq., United States Attorney for the Northern District of California, and Charles Elmer Collett, Esq., Assistant United States Attorney for said district, appearing as attorneys for the defendant above-named; the evidence having been received, the Court having fully considered the same, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith,

Now, Therefore, It Is Hereby Ordered, Adjudged  
And Decreed:

I.

That the plaintiffs, Ly Moon and Ly Sue Ning are not nationals or citizens of the United States.

II.

That the defendant recover costs in this action in the sum of \$. . . . .

So Ordered. Dated: January 28th, 1953.

/s/ LOUIS E. GOODMAN,  
United States District Judge.

Lodged January 19, 1953.

[Endorsed]: Filed January 29, 1953.

Entered January 30, 1953.

[Title of District Court and Causes.]

Civil Nos. 30159 and 31161.

### MOTION

To The Honorable Louis E. Goodman, Judge of  
The District Court:

Comes Now the Plaintiffs above-named and move this Court to vacate and set aside the Findings of Fact and Conclusions of Law and the Judgment and Decree of this Court, entered and filed on January 23, 1953, in the above-entitled matter.

Said Motion is made upon the grounds that said Judgment was entered prematurely; that the Findings of Fact and Conclusions of Law have not been settled; that no hearings have been held upon the Proposed Amendments to the Findings of Fact and Conclusions of Law.

Dated: January 31, 1953.

/s/ STANLEY J. GALE,  
Attorney for Plaintiffs.

Memorandum of Points and Authorities

Rule 4 (c), (d) and (e), Rules of Court, Northern District, as Amended July 12, 1951.

[Endorsed]: Filed February 2, 1953.

[Title of District Court and Causes.]

Nos. 30159 and 31161

FINDINGS OF FACTS AND  
CONCLUSION OF LAW

The above-entitled actions, heretofore consolidated for trial by Order of this Court, came on for trial on the 2nd, 3rd, and 4th days of September, 1952, and thereafter the matter was continued and further trial was held on the 14th day of November, 1952, and the 2nd day of December, 1952, before the above-entitled Court, Honorable Louis E. Goodman presiding; Stanley J. Gale appearing as Attorney for the plaintiffs above named; and Chauncey Tramutolo, United States Attorney for the Northern District of California, and Charles Elmer Collett, Assistant United States Attorney, appearing as Attorneys for the defendant above-named; and evidence having been received therein and the Court having fully considered the same and, on January 12, 1953, having filed its Opinion herein, and having filed herein on January 29, 1953 its Findings of Fact and Conclusions of Law and having thereafter set aside said Findings, now hereby makes the following Findings of Fact and, from said Findings of Fact, draws the following Conclusion of Law.

Findings of Fact

I.

It is not true that Ly Mon and Ly Sue Ning, the persons who claim to be the plaintiffs herein,

have always considered themselves and declared themselves to be citizens of the United States; it is not true that they have always intended to come to the United States; it is not true that it has always been their intention to keep and maintain their domicile and residence within and in the United States; it is not true that the residence and domicile of said Ly Moon and Ly Sue Ning is within the Northern District of California or within the United States of America.

## II.

That the persons who call themselves Ly Moon and Ly Sue Ning and who claim to be the plaintiffs herein and who claim to be the children of Ly Shew have failed to introduce evidence of sufficient clarity to satisfy or convince this Court that Ly Shew is the natural blood father of the persons known as Ly Moon and Ly Sue Ning; or that they were born at the times and in the places claimed; or that the persons who appeared before this Court claiming to be Ly Moon and Ly Sue Ning are in truth and in fact Ly Moon and Ly Sue Ning.

### Conclusion of Law

The persons appearing before this Court as plaintiffs in this action are not entitled to the relief prayed for in the petitions.

Let judgment be entered accordingly.

Dated: February 18, 1953.

/s/ LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed February 18, 1953.

In the District Court of the United States in and  
for the Northern District of California, South-  
ern Division

Civil No. 30159

LY SHEW, as Guardian ad Litem of LY MOON,  
a minor,

Plaintiff,

vs.

THE HONORABLE DEAN ACHESON, as Sec-  
retary of State of the United States,  
Defendant.

Civil No. 31161

LY SHEW, as Guardian ad Litem of LY SUE  
NING, a minor,

Plaintiff,

vs.

THE HONORABLE DEAN ACHESON, as Secre-  
tary of State of the United States,  
Defendant.

### JUDGMENT

The above-entitled action came on for trial on  
the 2nd, 3rd and 4th days of September, 1952, and  
the 14th day of November, 1952, and the 2nd day  
of December, 1952, before the above-entitled Court,  
Honorable Louis E. Goodman presiding, Stanley  
J. Gale, Esq., appearing as Attorney for the plaint-  
iffs above-named, and Chauncey Tramutolo, United  
States Attorney for the Northern District of Cali-  
fornia, and Charles Elmer Collett, Assistant United

States Attorney for said district, appearing as Attorneys for the defendant above-named; the evidence having been received, the Court having fully considered the same, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that Judgment be entered in accordance therewith,

Now, therefore, it is hereby Ordered, Adjudged and Decreed:

I.

That the relief sought by the plaintiffs, Ly Moon and Ly Sue Ning, be and the same is denied.

II.

That the defendant recover costs in this action in the sum of \$. . . . .

So Ordered:

Dated: February 18, 1953.

/s/ LOUIS E. GOODMAN,  
United States District Judge.

[Endorsed]: Filed February 18, 1953.

---

[Title of District Court and Causes.]

Civil Nos. 30159 and 31161

NOTICE OF APPEAL

Comes Nok Ly Shew, as Guardian ad Litem of Ly Moon and Ly Sue Ning, minors, and hereby gives notice to appeal and does hereby appeal to



the United States Court of Appeals for the Ninth Circuit, from the Judgment of this Court, entered on the 18th day of February, 1953, in the above-entitled matters, in favor of the Defendant above-named and against the said Plaintiffs above-named, and from the whole thereof.

Dated: March 17, 1953.

/s/ STANLEY J. GALE,  
Attorney for Plaintiffs.

[Endorsed]: Filed March 18, 1953.

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[Title of District Court and Cause.]

Civil No. 30159

### ORDER

Upon Motion duly made, and good cause being shown therefor, It Is Hereby Ordered that the Honorable John Foster Dulles, as Secretary of State of the United States, be substituted for and in the place and stead of the Honorable Dean Acheson, as Defendant in the above-entitled action.

Dated: April 6, 1953.

/s/ LOUIS E. GOODMAN,  
Judge of the District Court.

[Endorsed]: Filed April 7, 1953.

[Title of District Court and Cause.]

Civil No, 31161

### ORDER

Upon Motion duly made, and good cause being shown therefor, It Is Hereby Ordered that the Honorable John Foster Dulles, as Secretary of State of the United States, be substituted for and in the place and stead of the Honorable Dean Acheson, as Defendant in the above-entitled action.

Dated: April 6, 1953.

/s/ LOUIS E. GOODMAN,  
Judge of the District Court.

[Endorsed]: Filed April 7, 1953.

---

[Title of District Court and Causes.]

Nos. 30159 and 31161

### CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled cases and that they constitute the record on appeal as designated by the attorney for the appellants:

Order appointing Guardian ad litem. (No. 30159.)

Order appointing Guardian ad litem. (No. 31161.)

Petition for declaratory judgment. (No. 30159.)

Petition for declaratory judgment. (No. 31161.)

Answer. (No. 30159.)

Answer. (No. 31161.)

Amended complaint as of course. (No. 30159.)

Amended answer. (No. 30159.)

Order granting motion for physical examination. (No. 30159.)

Order granting motion for physical examination. (No. 31161.)

Opinion.

Findings of Fact and conclusions of law filed January 29, 1953.

Judgment filed January 29, 1953.

Motion to vacate and set aside the Findings of Fact and Conclusions of Law and Judgment filed January 29, 1953.

Findings of fact and conclusions of law filed February 18, 1953.

Judgment filed February 18, 1953.

Notice of appeal.

Statement of points which appellant intends to rely upon in the appeal.

Order substituting defendant. (No. 30159.)

Order substituting defendant. (No. 31161.)

Designation of contents of record on appeal.

Supplemental designation of contents of record, filed March 28, 1953.

Supplemental designation of contents of record,  
filed April 10, 1953.

Reporter's transcript, August 19, 1952.

Reporter's transcript, September 2, 1952.

Reporter's transcript, September 3, 1952.

Reporter's transcript, November 14, December  
2, 1952 and February 3, 1953.

Plaintiff's Exhibit 1.

Plaintiff's Exhibit 2.

Plaintiff's Exhibit 3.

Plaintiff's Exhibit 4 for ident.

Plaintiff's Exhibit 5 for ident.

Plaintiff's Exhibit 6 for ident.

Plaintiff's Exhibit 7.

Plaintiff's Exhibit 8.

Plaintiff's Exhibit 9.

Plaintiff's Exhibit 10.

Plaintiff's Exhibit 11.

Plaintiff's Exhibit 12-A.

Plaintiff's Exhibit 12-B.

Plaintiff's Exhibit 12-C.

Plaintiff's Exhibit 13.

Defendant's Exhibit A for ident.

Defendant's Exhibit B for ident.

Defendant's Exhibit D.

In Witness Whereof I have hereunto set my  
hand and affixed the seal of said District Court this  
14th day of April, 1953.

[Seal] C. W. CALBREATH,

Clerk,

By /s/ C. M. TAYLOR,

Deputy Clerk.

[Endorsed]: No. 13808. United States Court of Appeals for the Ninth Circuit. Ly Shew, as Guardian ad Litem of Ly Moon and Ly Sue Ning, Minors, Appellant, vs. John Foster Dulles, as Secretary of State of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed April 14, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 13808

LY SHEW, as Guaradian ad Litem of LY MOON,  
a Minor,

Appellant,

vs.

THE HONORABLE JOHN FOSTER DULLES,  
as Secretary of State of the United States,  
Appellee.

LY SHEW, as Guardian ad Litem of LY SUE  
NING, a Minor,

Appellant,

vs.

THE HONORABLE JOHN FOSTER DULLES,  
as Secretary of State of the United States,  
Appellee.

STATEMENT OF POINTS UPON WHICH AP-  
PELLANTS INTEND TO RELY ON AP-  
PEAL

Comes now Ly Shew, as Guardian ad Litem of Ly Moon, a minor, and as Guardian ad Litem of Ly Sue Ning, a minor, by and through his attorney, Stanley J. Gale, and pursuant to Rule 19(6), Rules on Appeal, and files herein the statement of points which Appellants intend to rely upon in the appeal of the above-entitled matters.

## I.

That the District Court erred in finding that it is not true that Ly Moon and Ly Sue Ning, the persons who claim to be the plaintiffs herein, have always considered themselves and declared themselves to be citizens of the United States; it is not true that they have always intended to come to the United States; it is not true that it has always been their intention to keep and maintain their domicile and residence within and in the United States; it is not true that the residence and domicile of said Ly Moon and Ly Sue Ning is within the Northern District of California or within the United States of America.

## II.

That the District Court erred in finding that the persons who call themselves Ly Moon and Ly Sue Ning and who claim to be the plaintiffs herein and who claim to be the children of Ly Shew have failed to introduce evidence of sufficient clarity to satisfy or convince this Court that Ly Shew is the natural blood father of the persons known as Ly Moon and Ly Sue Ning; or that they were born at the times and in the places claimed; or that the persons who appeared before this Court claiming to be Ly Moon and Ly Sue Ning are in truth and in fact Ly Moon and Ly Sue Ning.

## III.

That the District Court erred in holding that the persons appearing before this Court as plaintiffs in this action are not entitled to the relief prayed for in the petitions.

## IV.

That the District Court erred in not making full and complete findings relative to all the material matters set forth in the respective petitions herein.

## V.

That the Judgment of the District Court is not supported by the law and the evidence adduced at the trial thereof.

## VI.

That the Judgment of the District Court is contrary to the law and the evidence adduced herein.

## VII.

That by reason of the law and the evidence the said minors are entitled to a Judgment finding and holding that the said minors are the children of Ly Shew, a citizen of the United States, and, as such children, they are themselves citizens of the United States at birth.

Dated: April 20, 1953.

/s/ STANLEY J. GALE,  
Attorney for Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed April 22, 1953.



[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS  
OF RECORD ON APPEAL

Pursuant to Rule 19(6) of the Rules on Appeal, Appellants hereby designate the following matters to be printed as the material portions of the record on appeal:

Case No. 31161 USDC.

1. Petition for Declaratory Judgment.
2. Answer of Defendant.
3. Order Granting Motion for Physical Examination.
4. Order dated April 6, 1953, substituting party Defendant.

Case No. 30159 USDC.

1. Petition for Declaratory Judgment.
2. Answer of Defendant.
3. Amended Complaint as of course.
4. Amended Answer of Defendant.
5. Order Granting Motion for Physical Examination.
6. Order of Court and Minute Order consolidating Cases No. 30159 and No. 31161 for Trial and Further Proceedings.
7. Order dated April 6, 1953, substituting party Defendant.

Cases No. 30159 and 31161, USDC, Consolidated

1. Findings of Fact and Conclusions of Law dated January 29, 1953.

2. Judgment dated January 20, 1953.
3. Motion to Vacate and Set Aside Findings of Fact and Conclusions of Law and Judgment dated January 31, 1953.
4. Findings of Fact and Conclusions of Law dated February 18, 1953.
5. Judgment dated February 18, 1953.
6. Notice of Appeal.
7. Statement of Points which Appellants Intend to Rely Upon in the Appeal of the above-entitled matters, (USDC).
8. Statement of Points Upon Which Appellants Intend to Rely Upon Appeal, (USCA).
9. Opinion of Goodman, District Judge, dated January 12, 1953. (As Appendix.)
10. This Designation.

Dated: April 20, 1953.

/s/ STANLEY J. GALE,  
Attorney for Appellants.

[Endorsed]: Filed April 22, 1953.

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[Title of Court of Appeals and Cause.]

SUPPLEMENTAL DESIGNATION  
OF RECORD ON APPEAL

Pursuant to Rule 19(6) of the Rules on Appeal, Appellant hereby designates the following matters to be printed as material portions of record on appeal:

1. All exhibits introduced in said trial, including exhibits received in evidence and exhibits introduced for identification.

2. This designation.

Dated: April 27, 1953.

/s/ STANLEY J. GALE,  
Attorney for Appellant.

[Endorsed]: Filed April 28, 1953.

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United States Court of Appeals  
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Monday, May 4, 1953.

Before: Denman and Orr, C.J.J. and Carter, D.J.

ORDER SUBMITTING AND GRANTING MOTION FOR HEARING OF CAUSE ON TYPEWRITTEN REPORTER'S TRANSCRIPT AND BRIEFS, ETC.

Ordered motion of appellant for hearing of cause on typewritten reporter's transcript and typewritten briefs, and that exhibits be considered in their original form without the necessity of reproduction in the printed transcript of record, submitted to the court for consideration and decision.

On consideration whereof, further ordered that

said motion be, and hereby is granted, and that appellant be, and he hereby is permitted to prosecute his appeal herein on printed clerk's transcript, but on a single typewritten copy of the reporter's transcript, and that appellant be, and he hereby is permitted to file his briefs in typewritten form, prepared as required by Subdivision 6 of Rule 20, and that the exhibits in this cause be considered in their original form.

## NAMES AND ADDRESSES OF ATTORNEYS

STANLEY J. GALE, ESQ.,

320 Ochsner Building,  
Sacramento, California,

For Appellants.

LLOYD H. BURKE, ESQ.,

United States Attorney,  
San Francisco, California,

For Appellee.

record reference is hereby made and the same is hereby expressly made a part hereof.

And Whereas, the said Ly Shew, etc., appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and Provided, fully and at large appears.

And Whereas, on the 16th day of July, in the year of our Lord, one thousand nine hundred and fifty-four, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is vacated, and the causes be, and hereby are remanded with directions to make findings as to whether Ly Shew was the father of Moon and Ning, such findings to be made in the light of the opinion of this court, and thereupon enter such judgment as may be proper.

(December 30, 1954)

You, Therefore, are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as

according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the tenth day of March in the year of our Lord one thousand nine hundred and fifty-five.

[Seal]     /s/ PAUL P. O'BRIEN,  
Clerk, United States Court of Appeals for the  
Ninth Circuit.

[Endorsed]: Filed February 10, 1955.

[Endorsed]: Re-Filed March 10, 1955.

In the United States District Court for the Northern  
District of California, Southern Division  
No. 30159

LY SHEW, as Guardian Ad Litem of LY MOON,  
a Minor,  
Plaintiff,  
vs.

The Honorable DEAN ACHESON, as Secretary of  
State of the United States,  
Defendant.

No. 31161

LY SHEW, as Guardian Ad Litem of LY SUE  
NING, a Minor,  
Plaintiff,  
vs.

The Honorable DEAN ACHESON, as Secretary of  
State of the United States,  
Defendant.

STANLEY J. GALE,  
Sacramento, Calif.,  
Attorney for Plaintiff.

CHARLES ELMER COLLETT,  
Assistant U. S. Attorney,  
San Francisco, Calif.,  
Attorney for the Defendant.

Goodman, District Judge.

SUPPLEMENTAL OPINION AND FINDINGS  
UPON REMAND FROM THE COURT OF  
APPEALS

The Court heretofore filed its Opinion,<sup>1</sup> Findings

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<sup>1</sup>110 Fed. Supp. 50.



of Fact and Conclusions of Law and Judgment herein. Upon appeal and review by the Court of Appeals of this Circuit, the latter vacated our judgment and remanded the cause to us “with directions to make findings as to whether Ly Shew was the father of Moon and Ning, such findings to be made in the light of the opinion of this (Appellate) court, and thereupon enter such judgment as may be proper.”

The opinion<sup>2</sup> of the Court of Appeals stated that: “On the issue (thus) raised, Moon and Ning had the burden of proof, which is to say, the burden of proving that Ly Shew was their father.” That burden, the opinion states, was “the ordinary one,” i.e. “the ordinary burden of proof resting on plaintiffs in civil actions.” As to whether plaintiffs sustained that burden, the Court of Appeals expressed no opinion.

Recognizing that some of the evidence introduced by plaintiffs was uncontroverted, the opinion stated that we were “not required to believe such evidence or to accept it as true.”

Upon filing of the mandate here, we heard arguments from counsel with respect to new findings and judgment.

The statement of Chief Judge Denman in his dissenting opinion, *Ly Shew v. Dulles* . . F. 2d . . at p. . . that this Court wrongfully invoked a religious

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<sup>2</sup>F. 2d.

doctrine in its decision, requires airing. If I had thought that the simple statement in my opinion "In every sense, so far as I am concerned, this is God's country," would invoke criticism as a "wrongful invocation of religion," I would have spelled it out even more simply. How any reviewer could make out of this statement, anything more than a belief that this is a great country, smiled on by God, and a country which many oppressed people wish to enter, is most difficult to understand. But since the Chief Judge seems to have a different view, let me make it clear that no religious doctrine was invoked. The facts would have been appraised the same for Catholics, Jews, Protestants, Buddhists, as well as for so-called "Christo-Hebraics."

Upon consideration of the opinion and mandate of the Court of Appeals and the arguments of counsel, we now make the following Findings of Fact and Conclusions of Law:

1. It is not true that the persons who claim to be the plaintiffs herein have always considered themselves and declared themselves to be citizens of the United States; it is not true that they had always intended to come to the United States; and it is not true that it had always been their intention to keep and maintain a domicile and residence within the United States.

2. It is not true that the residence and domicile of said persons who claim to be plaintiffs is within the Northern District of California or in the United States of America.

3. In substantial respects, the evidence introduced by plaintiffs was inconsistent and contradictory and therefore not credible. Consequently it is not accepted as true. The burden of proving their citizenship rested upon plaintiffs. To sustain that burden plaintiffs had to prove by preponderating evidence that Ly Shew was their father. He may be, but plaintiffs did not sustain the burden of showing it. Hence, for that reason, the Court's finding is that Ly Shew was not the father of plaintiffs.

#### Conclusions of Law

1. The persons before the Court as plaintiffs in this action are not entitled to the relief prayed for.

Let judgment be entered accordingly.

Dated: March 31, 1955.

/s/ LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed April 1, 1955.

In the United States District Court for the Northern  
District of California, Southern Division

Civil No. 30159

LY SHEW, as Guardian Ad Litem of LY MOON,  
a Minor,

Plaintiff,

vs.

JOHN FOSTER DULLES, as Secretary of State  
of the United States,

Defendant.

### JUDGMENT

The judgment of this court entered January 30, 1953, having been vacated and the cause remanded by the Court of Appeals, and the above-entitled court, Honorable Louis E. Goodman presiding, having on the 1st day of April, 1955, filed herein supplemental opinion and findings upon remand from the Court of Appeals, including findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith,

Now, Therefore, It Is Ordered, Adjudged and Decreed:

1. That Ly Shew is not the father of Ly Moon.
2. That the relief sought by the plaintiff Ly Moon by his guardian Ly Shew, is denied.

Dated: April 5, 1955.

/s/ LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed April 5, 1955.

Entered April 6, 1955.

In the United States District Court for the Northern  
District of California, Southern Division

Civil No. 31161

LY SHEW, as Guardian Ad Litem of LY SUE  
NING, a Minor,

Plaintiff,

vs.

JOHN FOSTER DULLES, as Secretary of State  
of the United States,

Defendant.

### JUDGMENT

The judgment of this court entered January 30, 1953, having been vacated and the cause remanded by the Court of Appeals, and the above-entitled court, Honorable Louis E. Goodman presiding, having on the 1st day of April, 1955, filed herein supplemental opinion and findings upon remand from the Court of Appeals, including findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith,

Now, Therefore, It Is Ordered, Adjudged and Decreed:

1. That Ly Shew is not the father of Ly Sue Ning.

2. That the relief sought by the plaintiff Ly Sue Ning by her guardian Ly Shew, is denied.

Dated: April 5, 1955.

/s/ LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed April 5, 1955.

Entered April 6, 1955.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Comes Now Ly Shew, as Guardian Ad Litem of Ly Moon and Ly Sue Ning, minors, and hereby gives notice of appeal and does hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the Judgment of this Court, entered on the 6th day of April, 1955, in the above-entitled matters, in favor of the Defendant above named and against the said Plaintiffs above named, and from the whole thereof.

Dated: April 15, 1955.

/s/ STANLEY J. GALE,  
Attorney for Plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 19, 1955.

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[Title of District Court and Cause.]

### ORDER OF CONSOLIDATION

Upon reading and filing the affidavit of Stanley J. Gale and good cause appearing therefor;

It Is Hereby Ordered that the above-entitled matters be and the same hereby are consolidated for appeal.

/s/ O. D. HAMLIN,  
Judge of the District Court.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 6, 1955.

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in the above-entitled cases and that they constitute the record on appeal herein as designated by the attorney for the appellants:

Orders denying petition for rehearing in banc and denying petition for rehearing by U. S. Court of Appeals;

Mandate of U. S. Court of Appeals;

Supplemental opinion and findings upon remand from the Court of Appeals;

Judgment in Cause No. 30159, filed April 5, 1955;

Judgment in Cause No. 31161, filed April 5, 1955;

Notice of Appeal;

Designation of Record on Appeal;

Cost bond in Cause No. 30159 on appeal;

Cost bond in Cause No. 31161 on appeal;

Order of Consolidation;

Affidavit for order of consolidation on appeal;

Reporter's transcript of proceedings on appeal on Mar. 11, 1955.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 17th day of May, 1955.

[Seal]                      C. W. CALBREATH,  
Clerk;

By /s/ WM. C. ROBB,  
Deputy.

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[Endorsed]: No. 14768. United States Court of Appeals for the Ninth Circuit. Ly Shew, as Guardian Ad Litem of Ly Moon and Ly Sue Ning, Minors, Appellant, vs. John Foster Dulles, as Secretary of State of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 18, 1955.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.



In the United States Court of Appeals  
for the Ninth Circuit

No. 14768

LY SHEW, as Guardian Ad Litem of LY MOON,  
a Minor,

Appellant,

vs.

THE HONORABLE JOHN FOSTER DULLES,  
as Secretary of State of the United States,

Appellee.

LY SHEW, as Guardian Ad Litem of LY SUE  
NING, a Minor,

Appellant,

vs.

THE HONORABLE JOHN FOSTER DULLES,  
as Secretary of State of the United States,

Appellee.

STATEMENT OF POINTS UPON WHICH  
APPELLANTS INTEND TO RELY ON  
APPEAL

Comes now Ly Shew, as Guardian Ad Litem of Ly Moon, a minor, and as Guardian Ad Litem of Ly Sue Ning, a minor, by and through his attorney, Stanley J. Gale, and pursuant to Rule 17(6), Rules on Appeal, and files herein a statement of points which appellant intends to rely upon on appeal in the above-entitled matters.

## I.

That the findings of the District Court are contrary to the law and contrary to the evidence adduced at the trial.

## II.

That the judgment of the District Court is contrary to law and contrary to the evidence adduced at the trial.

## III.

That by reason of the law and the evidence the said minors are entitled to a Judgment finding and holding that the said minors are the children of Ly Shew, a citizen of the United States, and, as such children, they are themselves citizens of the United States at birth.

Dated: May 24, 1955.

/s/ STANLEY J. GALE,

Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 26, 1955.

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At a Stated Term, to wit: The October Term, 1954, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the sixth day of June in the year of our Lord one thousand nine hundred and fifty-five.

Present: Honorable William Denman,  
Chief Judge, Presiding;  
Honorable Homer T. Bone,  
Circuit Judge;  
Honorable William J. Lindberg,  
District Judge.

[Title of Cause.]

### ORDER

Upon motion duly made and submitted to the Court for consideration and decision on June 6, 1955; and,

Upon consideration thereof it is hereby Ordered that said motion be, and same hereby is granted and that appellant be, and he hereby is permitted to prosecute his appeal herein in the following manner:

(1) Upon consideration of the original Reporter's Transcript, the briefs and the exhibits in their original form, as contained in proceedings No. 13808 of the records of this Court.

(2) Upon the original Reporter's typewritten transcript of the proceedings held in the Trial Court after the remand of said action No. 13808.

(3) Upon the original printed transcript of the record contained in proceedings No. 13808.

(4) That appellant be and he hereby is permitted to file his briefs herein in typewritten form, prepared as required by Subdivision 6 of Rule 20 of the Rules of this Court.

That it is further Ordered that appellant only be required to print, as an amendment to the prior printed transcript of record, the following items:

(a) Supplemental opinion and findings of fact and conclusion of law after remand of proceedings No. 13808 to the Trial Court.

(b) Judgment.

(c) This designation.

No. 14,768

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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LY SHEW, as Guardian Ad Litem of  
Ly Moon and Ly Sue Ning, Minors,  
*Appellant,*

vs.

JOHN FOSTER DULLES, as Secretary of  
State of the United States,  
*Appellee.*

**BRIEF OF APPELLEE.**

---

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

422 Post Office Building,

Seventh and Mission Streets,

San Francisco 1, California.

*Attorneys for Appellee.*

**FILED**

**MAR 29 1956**

**PAUL P. O'BRIEN, CLERK**



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No. 14,768

IN THE

**United States Court of Appeals**  
**For the Ninth Circuit**

---

LY SHEW, as Guardian Ad Litem of  
Ly Moon and Ly Sue Ning, Minors,  
*Appellants,*  
vs.

JOHN FOSTER DULLES, as Secretary of  
State of the United States,  
*Appellee.*

---

**BRIEF OF APPELLEE.**

---

**PRELIMINARY STATEMENT.**

The previous judgment rendered in favor of defendant was vacated by the decision of this Court (219 F. 2d 413), and the cause was remanded "with directions to make findings as to whether Ly Shew was the father of Moon and Ning, such findings to be made in the light of this opinion." The trial court, pursuant to the mandate, rendered a supplemental opinion and findings upon the remand and judgment was again entered in favor of the defendant.

### SPECIFICATION OF ERRORS.

Appellants have made two specification of errors:

- (1) Appellants were denied due process of law by the arbitrary action of the trial court in refusing to accept uncontradicted and unimpeached testimony.
  - (2) The trial court failed to obey the mandate.
- 

### SUMMARY OF ARGUMENT.

(1) Appellants ask this Court to *retry* the facts, and upon application of *United States v. U. S. Gypsum Co.*, 333 U.S. 364, to reverse the trial court as “clearly erroneous.” The appellate court is not a fact finding de novo trial court. The court below viewed the witnesses and had the “live feel of the open forum” and its judgment is not “clearly erroneous.”

(2) The court below fully complied with the mandate of this Court.

---

### ARGUMENT.

- (1) THE JUDGMENT OF THE COURT BELOW IS NOT  
“CLEARLY ERRONEOUS”.

(a) The burden of proof was upon the appellants to establish their claims.

*Bauer v. Clark*, (CA-7), 161 F. 2d 397;

*Mar Gong v. Brownell*, (CA-9), 209 F. 2d 448;

*Elias v. Dulles*, (CA-1), 211 F. 2d 520;  
*Brownell v. Lee Mon Hong*, (CA-9), 217 F. 2d 143;  
*Chow Sing v. Brownell*, (CA-9), 217 F. 2d 140;  
*Law Don Shew v. Dulles*, (CA-9), 217 F. 2d 146;  
*Fong Wone Jing v. Dulles*, (CA-9), 217 F. 2d 138;  
*Wong Ken Foon v. Brownell*, (CA-9), 218 F. 2d 444;  
*Lew Wah Fook v. Brownell*, (CA-9), 218 F. 2d 924;  
*Lue Chow Kon v. Brownell*, (CA-2), 220 F. 2d 187;  
*U. S. ex rel Dong Wing Ott v. Shaughnessy*, (CA-2), 220 F. 2d 537;  
*Lee Dong Sep v. Dulles*, (CA-2), 220 F. 2d 264;  
*Ng Kwock Gee v. Dulles*, (CA-9), 221 F. 2d 942.

This Court, in reversing and remanding the previous judgment, stated:

“We hold that Moon and Ning’s burden of proof was the ordinary one.”

What constitutes the ordinary burden of proof in such a case as this was not defined. The case of *Mar Gong v. Brownell*, *supra*, was cited. The following is quoted from *Mar Gong*:

“We recognize all that may be said with respect to the necessity of the court guarding against imposition, but we are also of the view that no

special quantum of proof should be exacted from any person claiming American citizenship *merely because of his racial origin.*” (Emphasis ours.)

At no time has there been a contention in any of the 903 cases that a special quantum of proof should be exacted from Chinese claimants simply because of racial origin. Judge Goodman’s opinion upon which the previous judgment was founded stated that “proof of alleged citizenship must be clear and convincing,” not as related to Chinese alone, but as to any claimant arriving at a port of entry of the United States and asserting the right to enter as a citizen by derivation under Section 1993.

*Lee Sing Far v. U. S.*, (CA-9), 94 F. 834;

*Woey Ho v. U. S.*, (CA-9), 109 F. 888;

*Lee Sim v. U. S.*, (CA-2), 218 F. 432;

*Ex parte Chin Him*, (Western D. N.Y.), 227 F. 131.

The specific finding of Judge Goodman in *Ly Shew* was “\* \* \* plaintiffs have failed to introduce evidence of sufficient clarity to satisfy or convince this court \* \* \* .” (Tr. p. 49.)

This Court, in *Chow Sing v. Brownell*, *supra*, specifically reviewed the similar finding of the District Court that “the person (Sing) who claims to be plaintiff Chow Sing, has failed to introduce evidence of sufficient clarity to satisfy or convince this court that Chow Yit Quong is the natural blood father of the person known as Chow Sing or that the person (Sing) who appeared before the court claiming to be plaintiff Chow Sing is in truth and fact Chow

Sing,” and found that said finding was not clearly erroneous. The same finding was found not clearly erroneous in the decision in *Fong Wone Jing v. Dulles*. This Court amended the opinion in *Chow Sing* to state—“However, it appears that the District Court proceeded on the theory that the burden of proof resting on *Sing* was different from and heavier than the ordinary burden of proof resting on plaintiffs in civil actions—a theory which was and is untenable.” The remarks of Judge Goodman during the further proceedings following the remand of the mandate must be viewed in the light of the foregoing considerations.

After considerable discussion between counsel and the court Judge Goodman made the following comment (Tr. March 11, 1955 p. 27):

“The Court. Because of the nature of the cases. That is all there is to it.

I agree with Mr. Collett, this is not an adversary proceeding of any kind. I don’t think that was ever considered. The very language of the statute negatives that. It is a suit to declare American citizenship.

It is true it has to have as a basis for it the fact that somebody is denied some right of citizenship. But what the Court is called upon to do is not to declare that ‘A’ gets judgment against ‘B’ for anything at all. By the very terms of the statute this is declaratory of citizenship.

I don’t know how anybody can get away from that fact. That is what the statute says. That is the jurisdiction that is conferred, to declare whether a person is or is not an American citizen.

The reason jurisdiction is invoked is because some official or government has said to Jones, 'Well, I am not going to let you vote here', or 'You can't come into the United States', or some other specific act which denied a man a right which he had if he were an American citizen.

So the statute says, it has given the Court the authority to declare whether a man is a citizen or not. That is really the basis upon which I proceeded in trying to formulate some rule that would be helpful. Apparently the judges up above didn't agree with that, although they have not yet held that this is an adversary proceeding of any kind.

It still is a proceeding to declare citizenship. Now, it doesn't make any difference what kind of standard you apply. I think the Court has to decide whether the person has presented sufficient evidence to show he is an American citizen. That is all.

Mr. Gale. That is it."

(b) The credibility of a witness is a matter exclusively for the determination of the trial court.

*Chow Sing v. Brownell*, (CA-9), 217 F. 2d 140;  
*Mar Gong v. Brownell*, (CA-9), 209 F. 2d 448;  
*Law Don Shew v. Dulles*, (CA-9), 217 F. 2d 146;

*Lew Wah Fook v. Brownell*, (CA-9), 218 F. 2d 924;

*Lee Dong Sep v. Dulles*, (CA-2), 220 F. 2d 264;  
*Lue Chow Kon v. Brownell*, (CA-2), 220 F. 2d 187;



*Ng Kwock Gee v. Dulles*, (CA-9), 221 F. 2d 942;

*Wong Ken Foon v. Brownell*, (CA-9), 218 F. 2d 444.

(c) The mere say-so of interested witnesses, even though uncontradicted, does not have to be accepted.

*Quock Ting v. U. S.*, 140 U.S. 417;

*Chin Yow v. U. S.*, 208 U.S. 8;

*Marcella v. C.I.R.*, (CA-8), 222 F. 2d 878, 883;

*Purcell v. Waterman SS. Co.*, (CA-2), 221 F. 2d 953;

*Tam Dock Lung v. Dulles*, (CA-9), 218 F. 2d 586;

*Law Don Shew v. Dulles*, (CA-9), 217 F. 2d 146;

*NLRB v. Howell Chevrolet Co.*, 204 F. 2d 79, 86, Affd. 346 U.S. 482;

*Noland v. Buffalo Ins. Co.*, (CA-8), 181 F. 2d 735, 738;

*Heath v. Helmick*, (CA-9), 173 F. 2d 157, 161;

*Flynn ex rel Yee Suey v. Ward*, (CA-1), 104 F. 2d 900, 902;

*Inouye v. Carr*, 98 F. 2d 46;

*Mui Sam Hun v. U. S.*, (CA-9), 78 F. 2d 612, 615;

*Easton v. Brant*, 19 F. 2d 46;

*Quong Sue v. U. S.*, (CA-9), 116 F. 316;

*Woey Ho v. U. S.*, (CA-9), 109 F. 888;

*Lee Sing Far v. U. S.*, 94 F. 834.

(d) The repeated recognition by United States Courts of the incidence of fraud in Chinese claims to

derivative citizenship must of itself require a judge to open his eyes and ears as to the nature of the evidence presented in support of a claim.

*U. S. v. Sing Tuck*—Justice Holmes, 194 U.S. 161;

*The Chinese Exclusion Case*—Justice Field, 130 U.S. 581;

*Ex parte Jew You On*—Judge Bourquin, 16 F. 2d 152;

*Fong Ging Hung v. Acheson*, (unreported)—Judge Lemmon, Civil Action No. 6599 (U.S. D.C. N.D. Cal.);

*Gee Fook Sing v. U. S.*—Judge Hanford, 49 F. 146;

*Lee Sing Far v. U. S.*—Judge Hawley, 94 F. 834;

*Lee Sai Ying v. U. S.*—Judge Rudkin, 29 F. 2d 108;

*Ly Shew v. Acheson*—Judge Goodman, 110 Fed. Supp. 50;

*Mar Gong v. McGranery*—Judge Westover, 109 Fed. Supp. 821.

The Second Circuit, in *U. S. ex rel Dong Wing Ott v. Shaughnessy*, 220 F. 2d 537, in ruling on the ground of appeal that the blood tests are unconstitutional as a violation of due process because applied discriminatorily to applicants solely of the Chinese race, held that the ground must fail for two reasons. *First*, that it is not established that they are applied solely to Chinese, and *second*, that there is sufficient evidence of unusual circumstances relating to appli-

cants born in China during the period in question to justify a requirement of such additional evidence. The court said, page 540:

“Such a classification based on the lack of reliable written governmental records of birth and parentage, difficulty of access to the areas from which the claimed family groups come, and long absences from the family group of the citizen father who is an identifying witness, are circumstances justifying the distinction as one not based on race or color.”

The appellants' concept of the evidence sufficient to satisfy the burden of proof is to “merely go into the highlights”, with the expectation, as stated by appellants' counsel, “\* \* \* I know as a result of my experience that when he is turned over for cross-examination it will be gone into at great and extensive detail. So therefore I generally attempt to restrain myself to the highlights.” (Rep. Tr. Sept. 2, 1952, p. 19.) At page 112 of the same transcript in a colloquy between Mr. Gale and the Court:

“Mr. Gale. But in view of the fact that the mother is not present, in view of the fact that the father was absent at the time of the birth of one child, in view of the fact that there are no birth records, then we are thrown upon this method.

The Court. If that were the case anybody could get anybody else into the United States and establish their citizenship by the statement, ‘He is my brother. So and so is my sister.’ That would put the people of the United States at the mercy of any claimant as to who should enjoy the fellowship of citizenship here. That cannot

be the rule, that if a declaration of citizenship has to rest and depend for its validity solely upon the statement of a person that that is his brother or sister, it would be a pretty fragile structure upon which the Court could make a declaration under this statute of citizenship.”

In the supplemental opinion and findings upon remand (Tr. Rec. p. 77) Judge Goodman found:

“(3) In substantial respects, the evidence introduced by plaintiffs was inconsistent and contradictory and therefore not credible. Consequently it is not accepted as true. The burden of proving their citizenship rested upon plaintiffs. To sustain that burden plaintiffs had to prove by *preponderating* evidence that Ly Shew was their father. He may be, but plaintiffs did not sustain the burden of showing it. Hence, for that reason the Court’s finding is that Ly Shew was not the father of plaintiffs.” (Emphasis ours.)

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### THE EVIDENCE.

(1) Ly Shew, the alleged father—contributed no evidence of probative value to the record. He had not seen the plaintiff Ly Sue Ning prior to her arrival in the United States, and as to the plaintiff Ly Moon, he stated on direct examination that “he does not recognize his appearance very much but he remembers the name” (Rep. Tr. p. 25, Sept. 2, 1952).

(2) Ly On—this alleged brother’s memory was very short on any matters other than the specific claim that he is the brother of the two plaintiffs and that he

lived with them in the village. He claimed (Rep.Tr. pp. 94-95) that none of the children in the village went to school prior to the time he left the village. As against that we have the very interesting testimony of the plaintiff Ly Sue Ning (p. 215) that although she lived in the Toy Shan District Village she could only speak the Hoy Ping District dialect because she had lived at the school with a teacher who spoke the Hoy Ping dialect. In response to the question "Where did you learn the Hoy Ping dialect?" she answered "When I was young I used to go to school and my teacher was from Hoy Ping District and I used to sleep in school." She also stated that her brother Ly Ming (Ly Moon) went to school at the same time but he did not sleep in the school with the teacher. Apparently, not having slept in the school, he did not learn the Hoy Ping dialect.

The color of the cement in the floor of the house—Ly On first stated that "It is white cement." His attention was then called to his testimony on his admission to the United States, when he testified that the floors were made of red tile. Following a brief recess (Rep.Tr. p. 99) his recollection was apparently refreshed when he admitted that the floor was red tile.

"Q. Have you refreshed your recollection on the color of the floors of this house that you say you lived in?

A. It seems it is red tile.

Q. What do you mean by 'it seems'?

A. He isn't sure but he is thinking about it now.

Q. Does he need some more time to think about it?

A. It is red tile.

Q. When did you recall it was red tile instead of white cement?

A. During the recess. He tried to remember and it seems it is red tile."

The witness Ly Shew Ngor (Rep.Tr. p. 153), in response to the question "What was the color of the floor in your house?" answered "It is cement; a grayish white."

Ly Shew Ngor—the testimony of this witness as related to her admission into the United States as the daughter of Ly Shew her alleged marriage thereafter and the birth of her children by an unidentified, unproduced and very nebulous husband, renders the testimony of this witness not credible. (Rep.Tr. pp. 167-186.)

Ly Moon and Ly Sue Ning—a reading of the transcript of the testimony of these two witnesses adequately supports the disinclination of the trial judge to accept their testimony.

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### CONCLUSION.

Upon the record as presented, the findings and judgment of the court below are adequately supported by the evidence and in accordance with *U.S. v. U.S. Gypsum Co.*, *supra*, the judgment is not "clearly erroneous" and should be affirmed. The trial court did comply with the mandate of this Court. The entire reporter's transcript of the proceedings on the hear-

ing before the trial judge upon the mandate of this Court is contained in the record herein. The contention by appellants that the trial court failed to obey the mandate is wholly unsupported by the record.

It is respectfully submitted that the judgment of the court below be affirmed.

Dated, San Francisco, California,

March 23, 1956.

Respectfully submitted,

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

*Attorneys for Appellee.*





No. 14774

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United States  
Court of Appeals  
for the Ninth Circuit.

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ALBERT STAIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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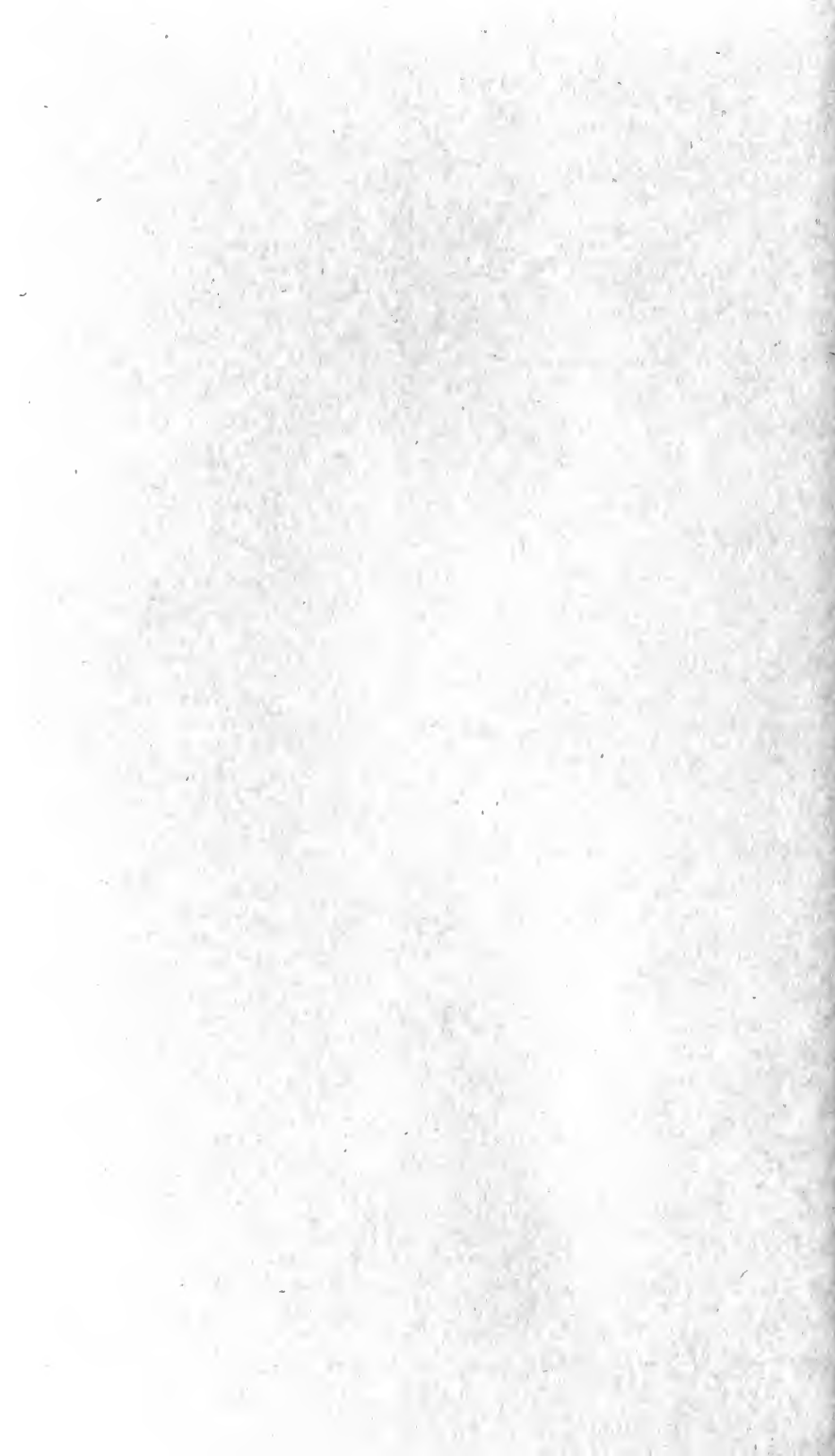
Transcript of Record

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Appeal from the United States District Court  
for the District of Oregon

FILED

SEP 12 1955



No. 14774

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United States  
Court of Appeals  
for the Ninth Circuit.

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ALBERT STAIN,

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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States Attorney, and

JAMES W. MORRELL,

Assistant United States Attorney,

506 United States Courthouse,  
Portland, Oregon,

For Appellee.





In the United States District Court  
for the District of Oregon

17444

UNITED STATES OF AMERICA

vs.

ALBERT STAIN,

Defendant.

INDICTMENT

For Violation of Section 462, Title 50, U.S.C., and  
Section 1632.14 of the Selective Service Regula-  
tions, Selective Training and Service Act of  
1948, as amended

United States of America,  
District of Oregon—ss.

The Grand Jurors of the United States of Amer-  
ica, for the District of Oregon, duly impaneled,  
sworn and charged to inquire within and for said  
District, upon their oaths and affirmations do find,  
charge, allege and present:

That at all times hereinafter mentioned Local  
Selective Service Draft Board No. 10 of Marion  
County, State of Oregon, was and now is a draft  
board within and for the County of Marion, State  
and District of Oregon, duly created and established  
under and by virtue of the provisions of the Selec-  
tive Training and Service Act of 1948, as amended,  
and the Rules and Regulations issued thereunder;

That Albert Stain, the defendant above named, on  
or about the 18th day of October, 1950, the exact

date being to the Grand Jurors unknown, in Marion County, in the State and District of Oregon, and within the jurisdiction of this Court, then and there being a male person between the ages of 18 and 26 years residing in the United States, and neither relieved by law from the duty of registering in compliance with the Selective Training and Service Act of 1948, as amended, nor relieved from liability for training and service thereunder, and the said Albert Stain having duly registered with the said Local Selective Service Draft Board No. 10 of Marion County, Oregon, and the said Local Selective Service Draft Board No. 10 having classified the said Albert Stain in Class 1-A, he, the said Albert Stain, did knowingly, wilfully, unlawfully and feloniously fail and neglect to perform a duty required of him under the said Selective Training and Service Act of 1948, as amended, and the Rules and Regulations made pursuant thereto, in that the said Albert Stain did knowingly, wilfully, unlawfully and feloniously fail and neglect to submit to induction at Eugene, Oregon, when so ordered by said Local Board No. 10, Marion County, Oregon; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 11th day of April, 1951.

A True Bill.

/s/ MATT O. NOONAN,

Foreman, United States  
Grand Jury.

**HENRY L. HESS,**

United States Attorney;

/s/ **EDWARD B. TIERNEY,**

Assistant United States

Attorney.

Bail, \$1,000.00.

Filed in open Court April 11, 1951.

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[Title of District Court and Cause.]

**MINUTE ORDER SEPTEMBER 16, 1953**

Now at this day come the plaintiff by Mr. James W. Morrell, Assistant United States Attorney, and the defendant, above named, in his own proper person and by Mr. G. Bernhard Fedde, of counsel. Whereupon, the defendant is duly arraigned upon the indictment herein, and for plea thereto, says that he is not guilty as charged therein. Thereupon,

It is Ordered that this cause be, and is hereby, set for trial Tuesday, November 3, 1953.

McC.

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[Title of District Court and Cause.]

**ACKNOWLEDGEMENT OF WAIVER OF  
TRIAL BY JURY**

This matter having come on for trial this 2nd day of October, 1954, the defendant, Albert Stain, appearing in person and represented by his attorney,

G. Bernhard Fedde, the United States of America being represented by James W. Morrell, Assistant United States Attorney, the defendant, Albert Stain, does hereby acknowledge in open court that he is fully advised by counsel and has orally waived and does by this writing waive the right of trial by jury in this cause and does consent to trial of all the issues of fact and law herein by the Court.

Dated at Portland, Oregon, this 2nd day of October, 1954.

/s/ ALBERT STAIN,  
Defendant.

/s/ G. BERNHARD FEDDE,  
Counsel for Defendant.

The United States of America agrees to trial by the Court without a jury.

/s/ JAMES W. MORRELL,  
Assistant United States  
Attorney.

Filed in open Court October 2, 1954.

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[Title of District Court and Cause.]

MINUTE ORDER OCTOBER 2, 1954

Now at this day come the plaintiff by Mr. C. E. Luckey, United States Attorney, and Mr. James W. Morrell, Assistant United States Attorney, and the defendant, above named, in his own proper person and by Mr. G. Bernhard Fedde, of counsel. Where-

upon, this cause comes on for trial before the Court, and the Court having heard the statements of counsel, and the evidence adduced, at the close of all of the testimony, plaintiff and defendant each having rested its case, defendant moves the Court for judgment of acquittal as to himself, and the Court having heard the arguments of counsel, reserves its decision.

It is Ordered that the plaintiff submit its memorandum in a few days.

McC.

---

In the United States District Court  
for the District of Oregon

No. C-17444

UNITED STATES OF AMERICA

vs.

ALBERT STAIN,

Defendant.

No. C-17819

UNITED STATES OF AMERICA,

vs.

RICHARD IVAN FAXON,

Defendant.

### MEMORANDUM

I have examined the files and exhibits in these cases. I see no reason to disturb the findings of the

Draft Boards, and the defendants may be brought in for sentence.

Dated October 8, 1954.

/s/ CLAUDE McCOLLOCH,  
Judge.

[Endorsed]: Filed October 8, 1954.

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[Title of District Court and Cause.]

### FINDING AND ORDER

This cause came on for trial before the undersigned Judge on October 2, 1954, the defendant having waived trial by jury; and

The Court having fully considered all of the evidence presented, does hereby

Find the defendant, Albert Stain, guilty as charged in the indictment herein; and it is

Ordered that the case be referred to the Probation Department for presentence investigation and that the defendant be continued on bail pending said investigation.

Dated at Portland, Oregon, this 18th day of October, 1954.

/s/ CLAUDE McCOLLOCH,  
United States District Judge.

[Endorsed]: Filed October 18, 1954.

United States District Court for the  
District of Oregon

No. C-17444

UNITED STATES OF AMERICA

vs.

ALBERT STAIN.

JUDGMENT AND COMMITMENT

On this 20th day of April, 1955, came Jas. W. Morrell, Asst. U. S. Attorney for the government, and the defendant appeared in person and by G. Bernhard Fedde, of counsel.

It is Adjudged that the defendant has been convicted upon a finding of guilty of the offense of knowingly, wilfully, unlawfully and feloniously failing and neglecting to perform a duty required of him under the said Selective Training and Service Act of 1948, as amended, and the Rules and Regulations made pursuant thereto as charged in the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of six months imprisonment.

It is Ordered that the Clerk deliver a certified

copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ CLAUDE McCOLLOCH,  
United States District Judge.

[Endorsed]: Filed April 21, 1955.

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[Title of District Court and Cause.]

COURT APPEARANCE BOND FOR  
ALBERT STAIN

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the United States of America the sum of One Thousand and no/100 dollars (\$1,000.00).

The condition of this bond is that the defendant, Albert Stain, is to appear in the United States Court of Appeals for the Ninth Circuit at San Francisco, in accordance with all orders and directions of the court relating to the appearance of the defendant before the court in the above-entitled case and if the defendant appears as ordered, then this bond is to be void, but if the defendant fails to perform this condition payment of the amount of the bond shall be due forthwith. If the bond is forfeited and the forfeiture is not set aside or remitted, judgment may be entered upon motion in the United States Court of Appeals for the Ninth Circuit against each debtor jointly and severally for the amount above stated together with interest and costs.



and execution may be issued or payment secured as provided by the Federal Rules of Criminal Procedure and other laws of the United States.

This bond is signed on the 23rd day of April, 19. ., at Salem, Oregon.

/s/ ALBERT STAIN,  
Name of Defendant.

/s/ ALEX STAIN,  
Name of Surety.

/s/ LINDA STAIN,  
Name of Surety.

Signed and acknowledged before me this 23rd day of April, 1955.

/s/ GEO. R. DUNCAN,  
Circuit Judge, 3rd Jud. District, Marion County,  
Oregon.

Justification of Sureties

I, the undersigned surety, on oath say that I reside at 1180 Claggett St., Salem, Ore., and that my net worth is the sum of One Thousand and no/100 dollars (\$1,000.00).

/s/ ALEX STAIN,  
Surety.

Sworn to and subscribed before me this 23rd day of April, 1955.

/s/ GEO. R. DUNCAN,  
Circuit Judge 3d Jud. Dist.,  
Marion County, Oregon.

I, the undersigned surety, on oath say that I reside at 1180 Claggett St., Salem, Ore.; and that my net worth is the sum of One Thousand and no/100 dollars (\$1,000.00).

/s/ LINDA STAIN,  
Surety.

Sworn to and subscribed before me this 23rd day of April, 1955.

/s/ GEO. R. DUNCAN,  
Circuit Judge 3rd Jud. Dist.,  
Marion County, Oregon.

[Endorsed]: Filed April 25, 1955.

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[Title of District Court and Cause.]

### ORDER TO TRANSMIT EXHIBITS

This matter coming up on Motion of the defendant for an Order to transmit the exhibits in the above-entitled cause, and the Court being fully advised in the premises, it is hereby

Ordered that the exhibits in the above-entitled cause, and consisting of the following:

Selective Service folder  
be transmitted to the Court of Appeals for the Ninth Circuit, where this cause is now pending.

Dated, at Portland, Oregon, this 17th day of May, 1955.

/s/ CLAUDE McCOLLOCH,  
Judge.

[Endorsed]: Filed May 17, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

1. The name and address of the appellant are:  
Albert Stain,  
Route 2, Box 453,  
Salem, Oregon.
2. The name and address of the appellant's attorney are:  
G. Bernhard Fedde,  
1108 S.E. Grand Avenue,  
Portland 14, Oregon.
3. The appellant is charged with a violation of Section 462, Title 50, U.S.C., and Section 1632.14 of the Selective Service Regulations, Selective Training and Service Act of 1948, as amended, by failing to submit to induction on or about October 12, 1950, as ordered.
4. On October 8, 1954, the Court found the appellant guilty. On April 20, 1955, the Court sentenced the appellant to six months' imprisonment.
5. The appellant has been released on bail pending appeal.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated, this 20th day of April, 1955.

/s/ ALBERT STAIN,  
Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed April 20, 1955.

[Title of District Court and Cause.]

## DOCKET ENTRIES

1951

Apr. 11—Entered Order to File Indictment and Fixing Bail.

Apr. 11—Filed Indictment.

Apr. 11—Filed Report of Foreman of Grand Jury.

Dec. 7—Entered Order Appointing Allan G. Carson as Defts. Atty.

Dec. 14—Entered Order Relieving Allan G. Carson as Defts. Atty., and Order Appointing G. Bernhard Fedde as Defts. Atty.

1953

Sept. 16—Record of Arraignment, Plea Not Guilty and Order Setting for Trial on Nov. 3, 1953.

Oct. 5—Entered Order Resetting for Trial on Dec. 14, 1953.

Dec. 4—Entered Order Striking From Trial on Dec. 14, 1953.

1954

Feb. 11—Filed Motion to Set for Trial.

Feb. 17—Entered Order Setting Motion to Set for Trial for Hearing Feb. 23, 1954.

Feb. 23—Filed Motion of Defendant for Continuance.

Feb. 23—Entered Order Allowing Continuance to March 22, 1954.

Mar. 22—Entered Order Setting for Trial May 11, 1954.

1954

Apr. 15—Entered Order Striking From Trial on May 11.

Sept. 17—Entered Order Setting for Trial on Sept. 28, 1954.

Oct. 2—Record of Trial Before Court, Hearing on Motion of Deft. for Judgment of Acquittal, Argued, Order for Memo. From U. S. & Order Reserving.

Oct. 8—Filed, Memorandum of Court. (Covers C-17819 also).

Oct. 18—Filed and Entered Finding of Guilty, Order for Presentence Investigation and Continuing Deft. on Bail.

1955

Feb. 16—Filed Probation Officer's Report (in File).

Apr. 20—Filed and Entered Judgment of Conviction and Sentence of Six Months Imprisonment.

Apr. 20—Issued Commitment and Copy to Marshal.

Apr. 20—Entered Order Continuing Deft. on Bond Pending Determination on Appeal.

Apr. 20—Filed Notice of Appeal.

1955

Apr. 25—Filed Bond on Appeal to U. S. Court of Appeals.

May 10—Filed Order Admitting Deft. to Bail Pending Appeal.

May 16—Filed Designation of Record.

May 16—Filed Motion for Order to Forward Exhibits.

May 17—Filed and Entered Order to Forward Exhibits.

May 18—Filed Transcript of Testimony, Oct. 2, 1954.

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United States District Court  
District of Oregon

No. C-17444

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT STAIN,

Defendant.

Saturday, October 2, 1954—A.M.

Before: Honorable Claude McColloch,  
Chief Judge.

Appearances:

C. E. LUCKEY,

United States Attorney; and

JAMES W. MORRELL,

Assistant United States Attorney,

Appearing on Behalf of the Government.

The Defendant appearing in person and by his attorney, Mr. G. Bernhard Fedde.

TRANSCRIPT OF TESTIMONY AND  
PROCEEDINGS

Mr. Morrell: If your Honor please, in the case

of the United States of America vs. Albert Stain, No. C-17444, the Government is ready to proceed with the trial.

The Court: Call your witness.

Mr. Morrell: Your Honor, before proceeding, the Defendant has indicated he wishes to file a written waiver of trial by jury, which he has not done previously.

The Court: It may be filed.

(Waiver by Defendant of trial by jury filed.)

Mr. Morrell: With the Court's permission, before introducing in evidence the Selective Service file relating to the Defendant, on which the Government will stand, it is our desire to make a short opening statement because of the unusual fact situation in this case.

The Court: You may make your statement.

(Opening statement by Mr. Morrell.)

Mr. Fedde: We will waive an opening statement.

(Discussion.)

Mr. Morrell: It is the desire of counsel for the Government and the Defendant to stipulate that the the Defendant was duly classified in Class 1-A by a Local Board in the State of Oregon which had jurisdiction over his classification; that he was thereafter ordered to report for induction as Class 1-A on August 18, 1950; that he was again ordered to report for induction and—I beg your pardon. He did report for induction on the 18th of October.

1950, and refused to be inducted at that time into the armed forces. Is that satisfactory? [2\*]

Mr. Fedde: Strike the word "duly." As far as "duly" classified is concerned, I do not want to stipulate to that.

Mr. Morrell: That is correct. He was classified by a Board which had jurisdiction over him in the State of Oregon.

Mr. Fedde: That is correct.

Mr. Morrell: It is stipulated further that the file may be offered in evidence on behalf of the Government. We are asking, however, that we be allowed to retain the file during the argument which will follow.

The Court: Have it marked.

(Selective Service System file pertaining to the defendant received in evidence and marked Government's Exhibit No. 1.)

Mr. Morrell: With the receipt in evidence of Government's Exhibit No. 1, the Government rests.

### Defendant's Testimony

#### ALBERT STAIN

the Defendant herein, produced as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Fedde:

Q. What is your name and address?



(Testimony of Albert Stain.)

A. Albert Stain, 1180 Claggett Street, Salem, Oregon.

Q. What has been your education? [3]

A. How is that?

Q. How much schooling have you had?

A. I finished Seventh Grade.

Q. Where? A. In Canada.

Q. How much did you go to school during those seven years?

A. We had long winters, and I didn't go to school too much—about three months in the winter and about three or four months in the summer.

Q. Six months every year you went to school, then? A. Yes.

Q. Until 18, how much of your life had been spent in Canada?

A. From 6 years old until I was about 20.

Q. I am going to hand you from Government's Exhibit No. 1 a document which is called SSS Form 100, and will ask you if you signed that form? A. Yes.

Q. Did you have any help in preparing that form? A. Yes, sir, I did.

Q. Who helped you?

A. Calvin Wildt.

Q. Who is he? A. He is my cousin.

Q. Now, I wish to hand you a form known as a special form for conscientious objectors, Form No. 150, and will ask you whether [4] you signed that form? A. Yes, sir, I did.

(Testimony of Albert Stain.)

Q. Did you have any help in preparing that form?

A. Only in the answers to the questions, because I didn't understand them.

Q. Who helped you?                    A. Mrs. Nettleton.

Q. Who is she?

A. She is a lady with the Quakers, I believe.

Q. This form was filed September 20, 1950. Why did you wait so long in filing it?

A. When I came from Canada, my cousin told me that I had to make out the form, and he said he would go with me and help me so I would get the right form. Then, when I had to report in Eugene to take my physical, they said I had to make out a different form, so that is why I made out that form.

Q. What was the time of your physical examination, what year?

A. I don't remember the year.

Q. I will hand you a document which is marked NME Form No. 47, a statement of the physical examination conducted at Eugene. Have you ever seen that form before?                    A. Yes.

Q. Did you have any help in preparing that form?                    A. No, I didn't. [5]

Q. I call your attention to the second sheet entitled "Report of Medical History," in which there are a number of pencil checks. Explain why your "Yes" and "No" answers came in a series of five or six in a row.

A. Well, I don't know. I am slow at understand-

(Testimony of Albert Stain.)

ing questions and so on, and we had a certain length of time to get these filled out, and I just went over them as fast as I could, to get as much done as I possibly could.

Q. Is that the explanation for this? Why didn't you stop when your time expired?

A. Well, we had to stop then. We knew we had a certain length of time to fill this out.

Q. Why did you say, among other things, that you had had gonorrhea?

A. Well, I didn't understand what that word was. I never did get around very much. I didn't know what that word meant, and the kid next to me he said just to put anything down, and I just went ahead and marked that down.

Q. Do you know now what it is?

A. I do know now.

Q. Have you ever had that disease?

A. No, I didn't.

Q. Where did you get your conscientious objector beliefs?

A. I have always had them—from the teaching of my folks and—well, it would be from childhood. [6]

Mr. Fedde: That is all.

### Cross-Examination

By Mr. Morrell:

Q. Where were you born?

A. I was born in Salem.

Q. Salem, Oregon?                      A. Yes, sir.

(Testimony of Albert Stain.)

Q. You thereafter moved back and forth to Canada to a certain extent? A. Just once.

Q. Isn't it true you registered for the draft in Salem, where you were living, in the latter part of 1946? A. I think somewhere around in there.

Q. Isn't it also true that immediately thereafter you moved up to Canada? A. No.

Q. Is it not true you registered again for the draft in 1949, about three years after you had registered the first time? A. Yes.

Q. In Eugene?

A. No, I didn't register in Eugene.

Q. In Salem? A. In Salem.

Q. You said on direct examination you had always had the belief [7] that you were conscientiously opposed to war, is that correct? A. Yes.

Q. That you had been since childhood?

A. Yes.

Q. Why was it, then, you did not assert those beliefs or did not raise any objection to being put in Class 1-A?

A. They classified me the same as my cousin was, and he was in 1-A, and I didn't know of any other classification.

Q. Isn't it a fact that a year and a half after you were classified, after you had taken your physical examination to go into the Army, you found out about the conscientious objector classification? Isn't that true? A. Yes.

Q. Then you went to the draft board and said

(Testimony of Albert Stain.)

“I can’t go. I am a conscientious objector.” That is also true, isn’t it?

A. Yes, but then from the time we came back from Canada, the laws were different and I didn’t know what the deal was or anything.

Q. Also, there was a war on, too, wasn’t there?

A. When I first came over?

Q. No. When you came back from Canada, the Korean War was going on, wasn’t it?

A. I think it was over then, I believe, or—I don’t remember. [8]

Q. On your direct examination, you gave as your reason for delay, or your reason for filling out the questionnaire as you did that you were slow in understanding the questions. Is that correct?

A. Yes.

Q. Isn’t it a fact when you received your order to report for induction—I mean, your order to report for physical examination—you promptly reported and were examined physically?

A. Yes, sir.

Q. You also testified you had assistance in and help from somebody in filling out the answers to the conscientious objector questions in Form 150, is that right?

A. Just in explaining the questions to me.

Q. I see. In other words, you did not understand the questions, is that correct?

A. Some of the questions that had big words, I didn’t understand.

Q. These questions in Form 150 are designed to

(Testimony of Albert Stain.)

find out what your beliefs are. You are aware of that?      A. Yes.

Q. And your answers are supposed to be your own answers; you understand that?      A. Yes.

Q. Isn't it true that this person—whoever it was—who [9] helped you with the answers also gave you various Bible quotations which you filled in as answers?

A. I looked them up myself in different places in the Bible.

Q. This was all done after you had been examined and found acceptable, isn't it true?

A. I think so.

Q. I may have asked you this before; I do not recall. You were classified twice, both times as 1-A. Did you ever take any appeal from those classifications to an appeal board?

A. How do you mean that?

Q. Did you ever ask the draft board to allow you to appeal within ten days after you were classified? The record shows you did not?

A. I don't remember.

Q. You do not remember?      A. No.

Q. Did you ever ask to appear before the Board personally, within a month, or a year, after you were classified?

A. Well, if they would have I would have been there.

Q. What I am getting at is: Did you ever in any way object to the classification until after you were given a physical examination for induction?

(Testimony of Albert Stain.)

A. No, I didn't. [10]

Redirect Examination

By Mr. Fedde:

Q. Where did you hear for the first time about the conscientious objector form?

A. At Eugene when I was taking my physical. They had told me at that time there were other things—they told me I had filled out the wrong form and that I had to fill out a different form. They told me to get the form at Salem and I got it and I filled it out then.

Q. Have you ever been told before that there was such a form possible to fill out?

A. No, had not been told.

Q. Counsel for the Government has implied you got help in framing the answers to this questionnaire. What is the fact?

A. The help that I got on that was help explaining the questions,

Q. The answers to the questions——

A. The answers are mine.

Mr. Fedde: That is all.

Recross-Examination

By Mr. Morrell:

Q. You said you were not advised that there was such a thing as a conscientious objector classification. Is that correct?

A. That is right. [11]

(Testimony of Albert Stain.)

Q. Until you took your physical?

A. Yes.

Q. I want to read from the document you just identified as your original questionnaire, Form 100. All the questions in that document, which is in evidence, were answered coherently. Series XVI says: "By reason of religious training and belief I am conscientiously opposed to participation in war in any form and for this reason hereby request that the local board furnish me a Special Form for Conscientious Objector (SSS Form No. 150) which I am to complete and return to the local board for its consideration."

There is a signature line under that, which was not filled in by you until a year and a half after your classification. That was the notice you were given when that form was given you on January 5, 1949.

A. Is that the form that Calvin Wildt helped me fill out?

Q. Yes. It is signed by you. Calvin Wildt helped you fill it out.

A. At the first—at the time he read it and saw the questions, went over them, he says "That is all you have to fill out," and I thought I was doing the right thing.

Q. You understood you were registering for the draft, isn't that correct, and that you might get in the Army as a result of what you stated in the form, is that correct?

A. I knew that everybody was registering. [12]



(Testimony of Albert Stain.)

Q. For the draft?

A. Well, if that is what it was. I don't remember anything on that.

Q. You just testified that you had been opposed to war in any form since childhood. Is that right?

A. Yes.

Q. When you registered for the draft, didn't you think it incumbent upon you to make some objection to serving in the Army?

A. Maybe I didn't take so much heed or notice. I mean, I didn't know what the deal was.

Q. What you mean to say is that you didn't think you would get called, isn't that correct?

A. No, it is not.

Mr. Morrell: That is all.

Mr. Fedde: That is all, your Honor. The Defense rests.

(Witness excused.)

The Court: What is your position, Mr. Fedde?

Mr. Fedde: Our position is that there are a number of violations of procedure and process, and for that reason we are pleading Not Guilty, and we are asking that judgment of acquittal be entered.

The Court: Is there any further testimony?

Mr. Morrell: I have no rebuttal witnesses. [13]

Mr. Fedde: At this time, if the Court please, I would like to move for judgment of acquittal on six grounds:

The first is that the denial of the conscientious objector classification by the draft board was arbitrary

and capricious in that, after reopening his case by giving him the Conscientious Objector form, Form No. 150, on September 14, 1950, which was filed on September 20, 1950, six days later, they held on September 26th, six days after that, that, inasmuch as Albert Stain on the basis of the questionnaire was given a physical examination and found acceptable, his record cannot be reopened. That can be seen by an examination of the file, and that is the sole reason assigned by this local board. Therefore, the draft board's order is illegal, arbitrary and capricious and contrary to law and without basis in fact.

The second basis for the motion is that the undisputed evidence and the draft board's records show that the local board deprived the defendant of his procedural rights to due process by not considering the substance of Form 150 as required by the regulations.

The third point is that the undisputed evidence and the draft board's records show that the local board deprived the defendant of his procedural rights to due process by failing to write a letter to the defendant on or after September 26th, 1950, stating the local board refused to reopen the classification [14] by considering Form 150 as required by Regulation 1625.4, thereby depriving the defendant of a personal appearance before them to explain personally his reason for claiming his 1-O position. Therefore, the order of induction which followed immediately thereafter is illegal, contrary to law, and without any basis in fact.

The fourth basis for the motion is that the undisputed evidence and the draft board's records show the local board deprived the defendant of his procedural rights to due process by failing to write a letter to the defendant on or after September 26, 1950, stating that the local board refused to reopen the classification to consider Form 150, as required by 1625.4, thereby depriving the defendant of an appeal to the appeal board.

Fifth, that the undisputed evidence and the draft board's records show that the local board deprived the defendant of his procedural rights to due process by failing to make an entry on the record sheet of Form 100 of his position, after having reopened the case by handing the Conscientious Objector Form 150 to the defendant on September 14th and filing it on September 20th, the entry being required by Regulation 1625.11, thereby depriving the defendant of an appeal to the appeal board from the decision in reopening. In other words, the record was not put in shape for appeal.

Finally your Honor, the undisputed evidence and the draft board's records show that there is no evidence in the defendant's [15] file, no affirmative evidence, to support the refusal of the local board to reopen his classification after having received and filed defendant's Form 150 on September 20th, and, therefore the decision of the local board on September 26th and the order of induction which followed on October 3rd are arbitrary, capricious, illegal and constitute a violation of due process of law.

Your Honor, I have prepared a memorandum which I will hand up.

The Court: Can you leave us a copy of your motion, too?

Mr. Fedde: Each point of the motion, as I have read it, is set forth in the memorandum.

(Argument of counsel.)

### Reporter's Certificate

I, Ira G. Holcomb, official court reporter, do hereby certify the foregoing to be a true, full and accurate transcript of my shorthand notes taken in the above-entitled cause on, to wit, October 2, 1954.

Dated at Portland, Oregon, this 18th day of May, 1955.

/s/ IRA G. HOLCOMB,  
Official Court Reporter.

[Endorsed]: Filed May 18, 1955. [16]

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### PLAINTIFF'S EXHIBIT No. 1

#### Series XIV.—Conscientious Objection to War

Instruction.—Any registrant who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form shall sign the statement below requesting a Special Form for Conscientious Objector (SSS Form No. 150) from the local board.

By reason of religious training and belief I am

conscientiously opposed to participation in war in any form and for this reason hereby request that the local board furnish me a Special Form for Conscientious Objector (SSS Form No. 150) which I am to complete and return to the local board for its consideration.

9-14-50.

/s/ ALBERT STAIN.

### Series XV.—Physical Condition

Instructions.—Every registrant shall complete this series. Any registrant who answers any of the questions listed below by “Yes” and who believes himself physically disqualified for service in the Armed Forces may attach an affidavit from his physician, hospital, or sanatorium to support his claim.

1. Do you have any physical or mental condition which, in your opinion, will disqualify you from service in the Armed Forces? [Ans.]: No.

2. If the answer to Question 1 is “Yes,” state the condition from which you are suffering:

[Ans.]: No.

3. Are you now, or have you ever been, an inmate or a patient in a mental hospital or institution?

[Ans.]: No.

4. Are you now, or have you ever been, an inmate or a patient in a tuberculosis hospital or sanatorium?

[Ans.]: No.

5. If the answer to Question 3 or Question 4 is “Yes,” give the name and address of each hospital, institution, or sanatorium: .....

6. Have you had treatment from a physician for any condition within the last 5 years?

[Ans.]: No.

7. If the answer to Question 6 is "Yes," state each condition from which you suffered and give the name and address of the physician who attended you, and dates of each treatment:.....

### Registrant's Statement Regarding Classification

Instructions.—It is optional with registrant whether or not he completes this statement, and failure to answer shall not constitute a waiver of claim to deferred or other status. The local board is charged by law to determine the classification of the registrant on the basis of the facts before it, which will be taken fully into consideration regardless of whether or not this statement is completed.

In view of the facts set forth in this questionnaire it is my opinion that my classification should be Class .....

The registrant may write in the space below or attach to this page any statement which he believes should be brought to the attention of the local board in determining his classification.

.....

### Registrant's Certificate

Instructions.—1. Every registrant shall make the registrant's certificate. 2. If the registrant cannot read, the questions and his answers thereto shall be read to him by the person who assists him in completing this questionnaire. 3. If the registrant is

unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

Notice.—Imprisonment for not more than five years or a fine of not more than \$10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Selective Service Law of 1948.)

I, ....., certify that I am the registrant named and described in the foregoing statements in this questionnaire; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing are not in my own handwriting.

Registrant sign here:

/s/ ALBERT STAIN.

(Signature of Mark of  
Registrant.)

/s/ CALVIN WILDT.

(Signature of Witness to  
Mark of Registrant.)

If another person has assisted the registrant in completing this questionnaire, such person shall sign the following statement:

I have assisted the registrant herein named in

preparation of this questionnaire because he did not understand it.

/s/ CALVIN WILDT.

(Signature of Person Who  
Has Assisted.)

(Registrants Will Make No Entries on This Page)

Minutes of Actions by Local Board  
and Appeal Board

2/14/49—Classified by local board: 1-A

1A, J. E. B. Vote: Yes 4, No 0.

2/17/49—Class 1-A SSS Form No. 110 Mailed to  
Registrant.

8/18/50—SSS 223 Order to Report for Preinduc-  
tion Physical mailed.

9/ 8/50—Form 62 mailed.

9/19/50—Form 150 handed to registrant.

10/ 3/50—SSS 252, Order to Report for Induction,  
mailed.

10/24/50—Inf. requested from records depot on  
first regis.

10/25/50—Forwarded to U. S. Attorney, Portland,  
Oregon.

2/ 7/51—File received from U. S. Attorney.

2/10/51—Letter to registrant telling him to report  
for induction Feb. 13. 1951.

2/14/51—Registrant appeared at the office stating  
he refused to submit to induction.

2/14/51—File forwarded to Mr. Stringer at State  
Headquarters.



Selective Service System

Special Form for Conscientious Objector

Selective Service No.: 35 10 28 269.

[Stamped]: Local Board No. 10, Marion County,  
Sept. 14, 1950, Salem, Oregon.

Name: (Last) Stain, (First) Albert.

Address: Rt. 2, Box 453.

Salem, Marion (County), Oregon.

This form must be returned on or before: 20  
September, 1950. (Five days after date of mailing  
or issue.)

Instructions

A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on this special form, which when filed shall become a part of his Classification Questionnaire (SSS Form No. 100).

The questions in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I, and the answers given by the registrant shall be for the information of only the officials duly authorized under the regulations to examine them.

In the case of any registrant who claims to be a conscientious objector, the local board shall proceed in the prescribed manner to determine his proper classification. The procedure for appeal from a decision of the local board on a claim of conscientious objection is provided for in the Selective Service Regulations.

Failure by the registrant to file this special form on or before the date indicated above may be regarded as a waiver by the registrant of his claim as a conscientious objector; Provided, that the local board, in its discretion, and for good cause shown by the registrant, may grant a reasonable extension of time for filing this special form.

### Series I.—Claim for Exemption

Instructions.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

(A) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service. I understand that if my claim is sustained I will be inducted into the armed forces but will be assigned to noncombatant service as defined by the President.

.....,

(Signature of Registrant.)

(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training or service in the armed forces. I, therefore, claim exemption from combatant training and service and, if my claim is sustained, I understand that I will, because of my conscientious objection to non-

combatant service in the armed forces, be deferred as provided in Section 6 (j) of the Selective Service Act of 1948.

/s/ ALBERT STAIN.

(Signature of Registrant.)

## Series II.—Religious Training and Beliefs

Instructions.—Every question in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Do you believe in a Supreme Being?

(Ans.) Yes.

2. Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief in a supreme being involves duties which to you are superior to those arising from any human relation.

I believe in Almighty God, thou shall not kill. The Bible teaches, "God is most powerful, Christians pray for God's Kingdom," Math. 6: 10. Jesus says my Kingdom is not of this world.—John 18:36.

then would my servants fight that I may not be delivered to the Jews. But now is my Kingdom not from hence

3. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above.

From childhood my parents have taught me

the Bible, I believe it myself and also read the Bible and try and follow what it says.

4. Give the name and present address of the individual upon whom you rely most for religious guidance.

I have had home Bible studies, "study to show thyself approved unto God a workman that needeth not to be ashamed rightly dividing the word of truth.—2 Timothy 2:15.

5. Under what circumstances, if any, do you believe in the use of force?

Remember the Lord, which is great and terrible and fight for your brethren and sons and your daughters, your wives and your houses.—Nehemiah:14.

6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

I was brought up in a Christian home and do unto others as I want others to do unto me. Jesus said unto him, Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind.—Matthew 22:37.

7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.....

### Series III.—General Background

Instructions.—Every question in this series must

be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance; and state in each instance the type of school (church, military, commercial, etc.).

Name of school: Silver Spring.

Type of school: Public.

Location of school: Okla, Sask., Canada.

Dates attended: From 1935 to 1945.

2. Give a chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the facts indicated below with regard to each position or job held, or type of work in which engaged.

Period worked: From 1947, to 1948.

(Type of work): Plumbing. (Name of employer): Hennry Ruchel. (Address of Employer): 1675 N. Commercial, Salem.

Period worked: From 1949, to 1950.

(Type of work): Truck Driver. (Name of Employer): J. H. Marks. (Address of Employer): Odessa, Texas.

Period worked: From 1934, to 1946.

(Type of work): Farming. (Name of Employer): My dad. (Address of Employer): Rt. No. 2, Box 453, Salem.

Period worked: From 1946, to 1947.

(Type of work): Cooks Helper. (Name of Employer): Perry. (Address of Employer): C. P. R. Vancouver, Canada.

3. Give all addresses and dates of residence where you have formerly lived.

Dates of residence: From 1934, to 1945.

(Name of city, town, or village): Okla. (State or foreign country): Sask., Canada. (Street address or R. F. D. route): Okla, Sask.

Dates of residence: From 1945, to 1947.

(Name of city, town, or village): Vancouver. (State or foreign country): British Columbia. (Street address or R. F. D. route): 127 Blundell Rd.

Dates of residence: From 1947, to 1950.

(Name of city, town, or village): Salem. (State or foreign country): Oregon. (Street address or R. F. D. route): Rt. No. 2, Box 453.

4. Give the name and address of your parents and indicate whether they are living or not.

Alex Stain and Linda Stain. Rt. No. 2, Box 453, Salem, Oregon. Both are living.

5(a) State the religious denomination or sect of your father?

Assembly of God.

(b) State the religious denomination or sect of your mother:

Assembly of God.

Series IV.—Participation in Organizations

Instructions.—Questions 1, 2, and 3 in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Have you ever been a member of any military organization or establishment? If so, state the name and address of same and give reasons why you became a member.

No.

2. Are you a member of a religious sect or organization?

No.

\* \* \*

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.

I have had some Bible studies with Jehovah's Witnesses.

Series V.—References

Give here the names and other information indicated concerning persons who could supply information as to the sincerity of your professed convictions against participation in war.

(Name): Alex Stain. (Full address): Rt. 2, Box 453, Salem. (Occupation or position): Farmer. (Relationship to you): Father.

(Name): Linda Stain. (Full address): Rt. 2.

Box 453, Salem. (Occupation or position):  
Housewife. (Relationship to you): Mother.

(Name): Milton E. Ostman. (Full address):  
1295 Shady Lane, Salem. (Occupation or posi-  
tion): Laborer. (Relationship to you): None.

### Registrant's Certificate

Instructions.—1. Every registrant claiming to be a conscientious objector shall make this certificate. 2. If the registrant cannot read, the questions and his answers thereto shall be read to him by the person who assists him in completing this questionnaire. 3. If the registrant is unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

Notice.—Imprisonment for not more than five years or a fine of not more than \$10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Selective Service Law of 1948.)

I, Albert Stain, certify that I am the registrant named and described in the foregoing statements in this questionnaire; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information,



and belief. The statements made by me in the foregoing are in my own handwriting.

Registrant sign here:

/s/ ALBERT STAIN.

(Signature or Mark of  
Registrant.)

\* \* \*

## STATEMENT OF LOCAL BOARD No. 10

September 26, 1950.

Board decided that inasmuch as Albert Stain, on the basis of his Questionnaire, was given a physical examination and found acceptable without protest, his record cannot be reopened.

/s/ PAUL R. HENDRICKS,

Member of the Local Board No. 10, Marion Co.,  
Salem, Oregon.

---

[Title of District Court and Cause.]

## CERTIFICATE OF CLERK

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Indictment; Record of arraignment and plea; Acknowledgement of waiver of trial by jury; Record of trial and hearing on motion for judgment of acquittal; Memorandum dated October 8, 1954; Finding and order; Judgment and commitment; Bond; Order to transmit exhibits; Designation of

record and Continuation of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered C-17444, in which Albert Stain is the defendant and appellant and the United States of America is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal is \$5.00, and that the same has been paid by the appellant.

I also certify that there is enclosed herewith the reporter's transcript of proceedings dated October 1, 1954, and Exhibit No. 1.

In Testimony Whereof I have hereto set my hand and affixed the seal of said court in Portland, in said District, this 23rd day of May, 1955.

[Seal]      /s/ F. L. BUCK,  
Acting Clerk.

---

[Endorsed]: No. 14774. United States Court of Appeals for the Ninth Circuit. Albert Stain, Appellant, vs. United States of America, Appellee: Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed May 24, 1955.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. C-14774

ALBERT STAIN,

Defendant-Appellant,

vs.

UNITED STATES OF AMERICA

## APPELLANT'S STATEMENT OF POINTS

### I.

Because of the errors in law and arbitrary and capricious acts of the local board, the District Court erred in failing to grant a Motion for Judgment of Acquittal.

### II.

The denial of the conscientious objector status by the local board was without basis in fact; consequently the I-A classification by the board is arbitrary, capricious and contrary to law.

### III.

The filing of the Form 150 (special form for conscientious objectors) by the appellant made a prima facie case justifying a change in classification to I-O, and the failure of the local board to consider the form on its merits at all and to build a record of affirmative substantial evidence of misrepresentation or any rebuttal at all was so arbitrary, capricious and contrary to law as to render

the subsequent Order to Report for Induction and the indictment based thereon null and void.

#### IV.

The refusal of the local board to reopen and meet appellant's prima facie case on the irrelevant ground that he had taken a routine physical examination without protest, and the subsequent failure to make any entry on the Form 100 of its decision, and the failure to write the appellant a letter stating its decision, and the failure of the local board to take any affirmative action continuing him in his earlier I-A classification, thereby depriving the appellant of a right to a personal hearing before the local board as well as an appeal to the state appeal board, were all arbitrary, capricious and contrary to law, so as to render the Order to Report for Induction seven days later and the indictment based thereon null and void.

/s/ G. BERNHARD FEDDE,  
Attorney for Defendant-  
Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed June 3, 1955.

**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

ALBERT STAIN,

*Appellant,*

v.

UNITED STATES OF AMERICA,

*Appellee.*

---

**APPELLANT'S BRIEF**

---

*Appeal from Judgment of Conviction by the United  
States District Court for the District of Oregon.*

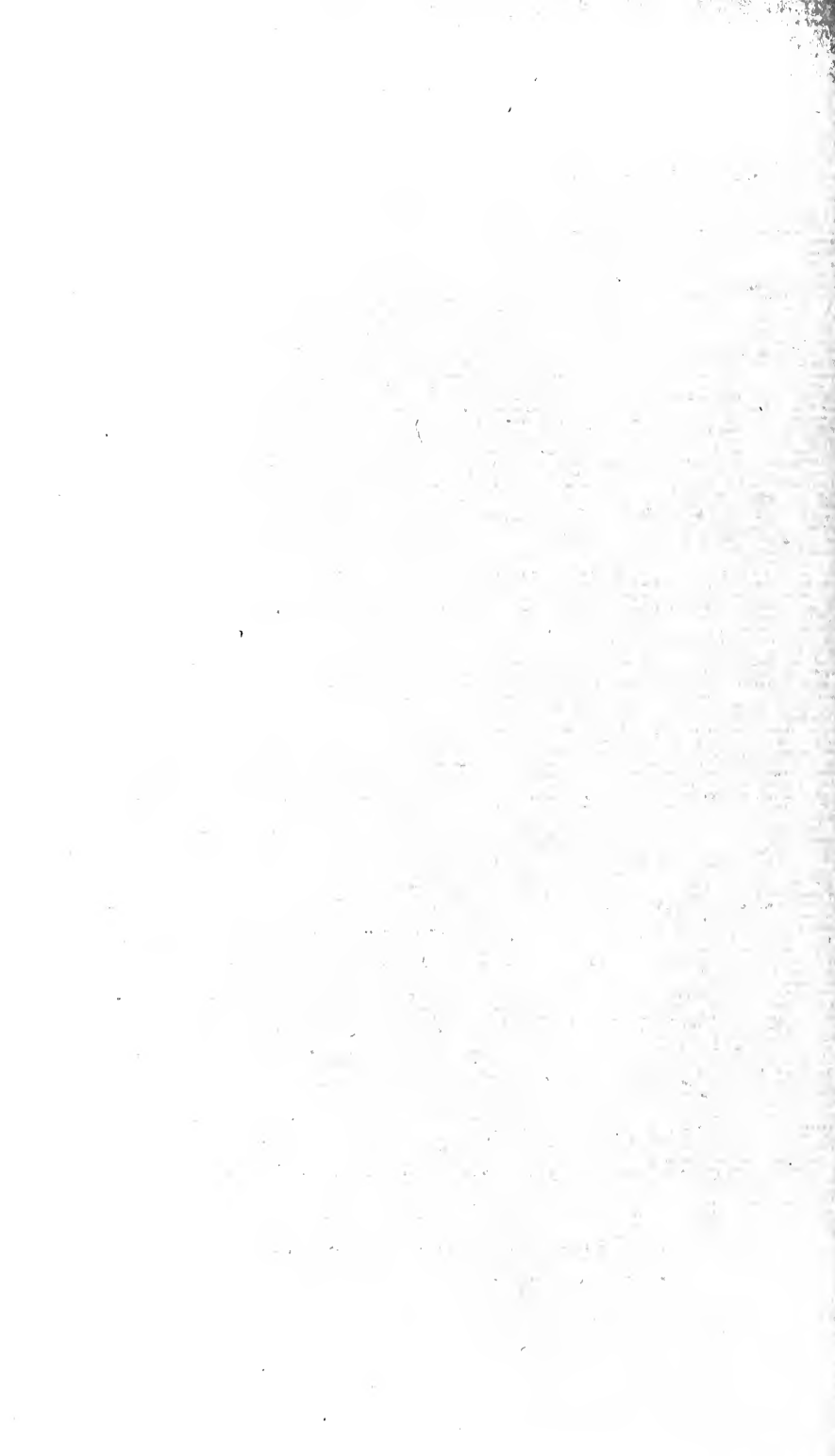
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G. BERNHARD FEDDE,  
1108 S. E. Grand Avenue,  
Portland, Oregon,  
*Counsel for Appellant.*

FILED

SEP 15 1955

PAUL P. O'BRIEN, CLERK



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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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ALBERT STAIN,

*Appellant,*

v.

UNITED STATES OF AMERICA,

*Appellee.*

---

**APPELLANT'S BRIEF**

---

*Appeal from Judgment of Conviction by the United  
States District Court for the District of Oregon.*

---

**NATURE OF THE CASE**

This is a criminal appeal from a conviction for refusal to submit to induction into the armed forces of the United States contrary to an order of a draft board.

**STATEMENT OF CASE**

Although Albert Stain, the appellant, was born in Salem, Oregon, in 1928, most of his life was spent in

Canada, and all of his schooling was obtained in a rural schoolhouse when weather permitted (Tr. 19). The family moved to Saskatchewan about 1934, and he finished the seventh grade there after a fashion. Except for one or two brief visits to the United States, during one of which in 1946 he registered for the draft, he lived continuously in Canada until about 1948 (Tr. 19, and Ex. No. 1). At that time he came back to Salem, Oregon, and his cousin, Calvin Wildt, who had been in the navy, told him in 1949 that he had to register again for the draft and fill out a Classification Questionnaire (Tr. 19-20, 22, 26). This cousin did not advise the appellant to sign Series XIV as a Conscientious Objector, but after looking over the questionnaire told the appellant, "That is all you have to fill out". (Tr. 26). An examination of the questionnaire (Form 100 in Ex. No. 1) will show that despite the help of his cousin it is full of errors, corrections, misspellings (Marion County being "Mar-ri-on"), even to giving the wrong date of birth (1927, instead of the correct 1928), and concludes with the significant statement:

"I have assisted the registrant herein named in preparation of this questionnaire because *he did not understand it*.

/s/ CALVIN WILDT"

This failure to understand and grasp the meaning of words and what was happening has dogged the appellant throughout the ensuing encounter with Selective Service (Tr. 20-23, 27). Where he was unaided (as in the physical examination) he bungled matters. Not until he took his physical examination on September 6, 1950 did any-

one advise him that there was such a thing as a conscientious objector classification or a special form to fill out (Tr. 25). And he promptly asked for that form (Form 150) and filled it out within the required time with the help of a Mrs. Nettleton, "a lady with the Quakers" (Tr. 20). The answers are his own, as both their form and spelling would indicate. Everything he filed showed every earmark of lack of understanding, and, although it was apparent on his Form 150 that his belief in God forbade his participation in war through any form of military service, much of several answers was only slightly relevant (Tr. 37-38).

On September 14, 1950 (the minute entry says "9-19-50"), at appellant's request the local board issued officially to him by hand a Form 150 (Special Form for Conscientious Objectors), which he duly returned on September 20, 1950, according to the receipt stamped on the face thereof. This form among other things stated that:

"I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training or service in the armed forces. I, therefore, claim exemption from combatant training and service and, if my claim is sustained, I understand that I will, because of my conscientious objection to noncombatant service in the armed forces, be deferred as provided in Section 6 (j) of the Selective Service Act of 1948.

/s/ ALBERT STAIN"

"I beleave (sic) in Almighty God."

"Thou shall (sic) not kill."

"From my childhood my parents have taught me the Bibel, I beleave it myself and also read the Bibel and try and falow what it says". (Sic)

"I was brought up in a Christian home \* \* \*"

"Do unto others as I want others to do unto me."

Granted that this sums up to an unlettered and inarticulate presentation of a conscientious objector position, nevertheless the local board did not question his veracity but chose to ignore all that he presented and allegedly refused to reopen his case on the ground that he had been "given a physical examination and found acceptable without protest" (Tr. 43). This statement, although placed surreptitiously in his file and dated September 26, 1950, was never sent to the appellant; neither was any letter to that effect nor any notice of classification or continuance in his present classification sent to him, nor was any minute of the action entered on appellant's cover sheet (Tr. 34). In fact, after filing his request for classification as a conscientious objector the appellant heard nothing until receiving his Notice to Report for Induction, mailed October 3, 1950 (Tr. 34). He was given no opportunity to present his explanation of any questions the board might have had if it had read his Form 150 at all. He was deprived of the right to appear personally before the local board. He was deprived of the right of appeal.

Inarticulate and shy, the appellant went along with such irregular procedures unwittingly and reported for induction on October 18, 1950 as directed. When asked to take the step forward symbolic of entering military

service, he refused. His file indicates that he thereupon at the induction center wrote out a further explanation of his belief, as follows:

"I refuse to be inducted into the Armed Services of the United States."

"I beleave in God, and it says in my Bibel thou shalt not Kill. it says love thy God with all thy hart, and all thy soul, and all thy mined Jeseus says if my Kingdom were of this world then would my servents fight, But now my Kingdom is not of this world. (sic)

"It says in my Bibel who shall take'th the sword shall die with the sword (sic)

/s/ ALBERT STAIN"

(Ex. No. 1)

Here, unaided by anyone, the appellant set forth his belief in God, his reliance on the Holy Scriptures as the source of his motivation, and his conviction that military service conflicted with his religious faith. This, written on October 18, 1950, four weeks after filing his Form 150 indicates further what the local board would have learned if it had studied that form and called him in for questioning. But the local board had chosen to ignore the new facts in his file. His case was sent up to Portland for presentation to the Grand Jury. Indictment (Tr. 3-5) was returned on April 11, 1951.

While this indictment was pending, Selective Service caused a neuro-psychiatric evaluation to be made by a contract psychiatrist, Herman A. Dickel, M.D., and his report of April 23, 1952 to Selective Service includes the following comment:

"It is my opinion at the present time that this 23 year old, single, white American male falls into the category of the *mildly inadequate*, somewhat emotionally unstable group of individuals who might possibly break down under severe enough stress and strain, so that he would develop an actual psychotic illness. This opinion is based chiefly upon the history of mild deviations in behavior in the past, his present trends and *limited ability*, and the general lack of normal emotional response. \* \* \*

"I am recommending, therefore, from a psychiatric point of view that everything be done to persuade this chap to enter service on a voluntary basis and to go into *noncombat* type. \* \* \* "

(Ex. No. 1) (Italics supplied)

It should be noted that this report described a young man nearly two years older than when he filed his Form 150; yet despite the passage of time he was still mildly inadequate and of limited ability. These factors, plus his lack of schooling, explain the sketchiness in his presentation of his claim as a conscientious objector.

The appellant pleaded "Not Guilty" and stood trial on October 2, 1954. The motion for judgment of acquittal was denied. He was found "Guilty" and sentenced on April 20, 1955 to six months' imprisonment.

The appellant has appealed that Judgment to this Court.

## SUMMARY OF ARGUMENT

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of



veracity presented, the problem to be determined here by this Court is one of law rather than one of fact.

It is respectfully submitted, then, that the conviction of Albert Stain must be set aside for the following reasons:

1) The filing of the Form 150 (Special Form for Conscientious Objectors) made a prima facie case justifying a change in classification to I-O, and the failure of the local board to consider the form at all on its merits was so arbitrary, capricious and contrary to law as to render the subsequent Order to Report for Induction and the indictment based thereon null and void.

2) The failure of the local board to build a record of affirmative substantial evidence of misrepresentation or any rebuttal at all rendered its denial of the conscientious objector status without basis in fact, and therefore arbitrary, capricious and contrary to law. All the evidence in the Selective Service file is unequivocal that he could not properly be continued in I-A.

3) On the procedural side, (a) the refusal of the local board to reopen and meet his prima facie case and their citing irrelevant grounds, (b) the failure to write the appellant a letter stating its decision, (c) the failure of the local board to take any affirmative action continuing him in his earlier I-A classification or placing him in any other classification, and (d) the subsequent failure to make any entry on the back of the Form 100 of its decision,—these each left the record in such improper shape as to deprive the appellant of notice and a right to a personal appearance before the local board,

and of a right to an appeal to the state appeal board; and such deprivation constituted a material violation of due process of law so as to render the Order to Report for Induction and the indictment based thereon null and void.

## ARGUMENT

### I.

#### APPELLANT MADE PRIMA FACIE CASE

**The filing of the Form 150 (Special Form for Conscientious Objectors) by the appellant made a prima facie case justifying a change in classification to I-O, and the failure of the local board to consider the form on its merits at all was so arbitrary, capricious and contrary to law as to render the subsequent Order to Report for Induction and the indictment based thereon null and void.**

The rights of conscientious objectors stem from the Act of Congress which provides (Selective Service Act of 1948, 50 USCA App. Sec. 456 (j) ) in part:

“Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. \* \* \* Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be *entitled to an appeal* to the appropriate appeal board. \* \* \*”  
(Italics supplied)

In seeking to comply with the letter and spirit of the law, regulations were promulgated by Selective Service (32 C.F.R. 1625.2) which provide in part:

"The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, \* \* \* if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; \* \* \* provided, \* \* \* the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction \* \* \* ".

Since the induction order had not been sent when the appellant filed his Form 150, there is no doubt that his form was timely; nor does the Government urge otherwise. Nor did the draft board raise any objection on this score at any time either before or after officially issuing the form.

The Form 150 was in writing, signed by the appellant, and set forth the following facts not considered when he was classified earlier:

- 1) That he was by reason of his religious training and belief, conscientiously opposed to participation in war in any form and that he was further conscientiously opposed to participation in non-combatant training or service in the armed forces.
- 2) That he believed in a Supreme Being, i.e., Almighty God.
- 3) That he had been taught the Bible from childhood, and had been brought up in a Christian home.
- 4) That his parents were members of the Assembly of God.
- 5) That his belief in God included the injunction not to kill, and the Golden Rule.
- 6) That he therefore claimed exemption from combatant training and service as well as noncombatant service in the armed forces.

Furthermore, his opposition to military service is not based on sociological, political or philosophical beliefs, but is grounded in an immovable belief in a Supreme Being. This belief is supported by the direct Word of God, the Bible. It is not a limited objection that he has. He is not willing to join the army as a noncombatant soldier or go in as a conscientious objector only to actual combat service. He objects to doing anything in the armed forces. He will not be a soldier.

If true, these facts would have justified a change in the appellant's classification. It was completely new information to the local board, and it was presented by the appellant promptly after he had been advised that his position should be set forth on a Form 150.

But, whereas the board had done its duty in issuing and receiving the form, it failed wholly to do its duty under the law and regulations when it failed to consider it on its merits at all. After the appellant had presented his facts, the local board could not lawfully refuse to weigh the evidence.

It is well established law that a classification which is arbitrary, based upon tests at variance with the statute or having no basis in fact, is beyond the jurisdiction of Selective Service and illegal and cannot result in conviction for refusal to obey a notice to report for induction.

Dickinson v. United States, 346 U.S. 389, 98 L. Ed. 132, 74 S. Ct. 152 (1953).

Estep v. United States, 327 U.S. 114, 90 L. Ed. 567, 66 S. Ct. 423 (1946).

The *Estep* case, the leading case on the scope of judicial review of a draft board decision under World War II legislation similar to the statute here involved, held that the question of the local board's jurisdiction was reached "if there is no basis in fact for the classification which it gave the registrant." See Shipley on "Selective Service: Finality of Draft Board Decisions", in 41 American Bar Association Journal, 709, at 711 (August 1955).

In the *Dickinson* case the Court held that the local board was not free to disbelieve a registrant's testimonial and documentary evidence as to his sincerity in the absence of any impeaching or contradictory evidence. The Court said:

"But when the uncontroverted evidence supporting registrant's claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice. \* \* \* "

Whereas in the *Dickinson* case the board went so far as to suspect and speculate, in the appellant's case the board did not observe his sincerity or demeanor or even consider the facts, but brushed them off with an irrelevant and untrue comment that since he had been "given a physical examination and found acceptable *without protest*, his record cannot be reopened" (Tr. 43). (Italics supplied.) Note that it was at his physical examination he made his protest known against military service and learned of the Form 150 (Tr. 25).

The recent case of *Rempel v. United States* (CA 10, 1955), 220 F. 2d 949, at 951, has stated the rule lucidly, as follows:

"It is equally well settled that where a registrant makes a prima facie showing that he is conscientiously opposed to participation in war in any form, the rejection of his claim for exemption cannot stand as an undergirding support for a prosecution of this kind *unless there be in his registration file some showing of a countervailing nature* which tends to justify a finding on the part of the classification board *that the claim is not made in good faith.* \* \* \*" (Italics supplied)

There is nothing in the case at bar to indicate that the appellant's claim was not made in good faith.

It follows, necessarily, under the cases cited, that the action of the local board in not considering his Form 150 and in subsequently issuing the order to report for induction are illegal, beyond the jurisdiction of the board, and cannot be made the grounds for a criminal conviction.

## II.

### **ACTION OF BOARD WITHOUT BASIS IN FACT**

**The failure of the local board to build a record of affirmative substantial evidence of misrepresentation or any rebuttal at all rendered its denial of the conscientious objector status without basis in fact, and therefore arbitrary, capricious and contrary to law.**

The Special Form for Conscientious Objectors (Form 150) which the appellant was given with the consent of the local board (Tr. 34) and which was filled out and filed within the time specified thereon by the clerk of

the local board, made a prima facie case for reopening and reclassification as a conscientious objector.

This Court of Appeals in *Schuman v. United States* (CA 9, 1953), 208 F. 2d 801, was faced with a similar case and said:

“In view of the statutory language of 50 U.S.C. App. Sec. 456 (j), the denial of the exemption as a conscientious objector amounted to a finding that Schuman was not, ‘by reason of religious training and belief \* \* \* conscientiously opposed to participation in war in any form.’ Yet Schuman’s statements as to his religious beliefs are uncontradicted, and one of the two members of the local board who were present at the hearing stated to Schuman, ‘Your veracity of your faith is unquestionable.’ We cannot find in the proceedings before the local board any affirmative evidence which controverts Schuman’s claim. There are only the suspicions raised by the fact that Schuman did not begin his religious studies until after he had registered for the draft and by the fact that he had not sought exemption until after the Korean War broke out. As the Supreme Court has stated, ‘When the uncontroverted evidence supporting a registrant’s claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice.’ *Dickinson v. United States*, \* \* \*.

“The judgment of the district court is reversed and the cause is remanded with instructions to dismiss.”

And again in *Ashauer v. United States* (CA 9, 1954), 217 F. 2d 788, the Ninth Circuit held:

“\* \* \* Searching the entire record, as is our duty, we find therein no evidence of whatever nature which is incompatible with the claim of exemption

and we must hold, accordingly, that appellant's classification as I-A was without basis in fact. \* \* \*"

In the case at bar, after having made his claim for exemption no question was raised at any stage of the administrative proceeding as to the appellant's sincerity or good faith. Except for what was in his file, the local board had no other basis for its determination, because it never saw the appellant so as to form an impression of his demeanor. The record is barren of anything impugning his veracity.

Parenthetically, the appellant's appearance four years later at his trial still was that of a sincere and shy person seeking not an escape from service but only to present the claims of his conscience. His inadequate education in rural Canada and inability to understand and express himself did not minimize his sincerity, but served rather to explain why he had been so inarticulate on his forms.

In *United States v. Vincelli* (CA 2, 1954), 216 F. 2d 681, wherein the registrant had filed a letter "appealing" his I-A classification and the board later sent him a Form 150 which he returned in time, the board refused to reopen the case; but the Court of Appeals said:

"Though the language in the regulation (32 C.F.R. Sec. 1625.2) is permissive merely that does not mean that a local board may refuse to reopen arbitrarily, but requires it to exercise *sound discretion*. That, in turn, requires, when the basis of an application is not clearly frivolous, an inquiry designed to test the asserted facts sufficiently to give the board a *rational base* on which to put decision. \* \* \*" (Italics supplied)



See also the discussion by Shipley, "Selective Service: Finality of Draft Board Decisions", 41 American Bar Association Journal 709, at 711 (August 1955).

Where, in the case at bar, is the finding of frivolity? Where is the exercise of sound discretion in ignoring appellant's Form 150? By what stretch of the imagination can the notation in the file dated September 26, 1950 (Tr. 43) be considered a rational base? Where has the draft board set forth any rebuttal or affirmative evidence of misrepresentation?

It follows relentlessly that an inquiry to test the appellant's assertions became imperative, and since the decision of the local board was without basis in fact, the I-A classification by the board after receiving the appellant's prima facie case became arbitrary, capricious and contrary to law, and the Order to Report for Induction based thereon is void.

### III.

#### LOCAL BOARD PROCEDURE VIOLATED DUE PROCESS

**On the procedural side, the errors and omissions of the local board left the record in such improper shape as to deprive the appellant to a right to a personal appearance before the local board, and of a right to an appeal to the state appeal board; and such deprivation constituted a material violation of due process of law so as to render the Order to Report for Induction and the indictment based thereon null and void.**

The scope of review in Selective Service cases, as far as the classification is concerned, is limited and restricted. *Estep v. United States*, 327 U.S. 114, 90 L. Ed.

567, 66 S. Ct. 423 (1946). In cases where the review is restricted, there must be a strict compliance with the requirements of procedural due process by the administrative agency. *N.L.R.B. v. Cherry Cotton Mills* (CA 5, 1938), 98 F. 2d 444, at 446. For the final order to be valid the local board must strictly comply with the procedural requirements. *VerMehren v. Sirmyer* (CA 8, 1929), 36 F. 2d 876, at 881; *United States v. Zieber* (CA 3, 1947), 161 F. 2d 90, at 92; *Ex parte Fabiani* (E.D. Pa., 1952), 105 F. Supp. 139; *United States v. Graham* (N.D. N.Y., 1952), 108 F. Supp. 794; *Bejelis v. United States* (CA 6, 1953), 206 F. 2d 354.

In *Dismuke v. United States* (1936), 297 U.S. 167, at 172, 80 L. Ed. 1011, 56 S. Ct. 594, Mr. Justice Stone, speaking for the Court, commented:

“\* \* \* if he [the administrator] is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority \* \* \* by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized, \* \* \*. But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statutes creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled. \* \* \*”

In *DeMoss v. United States* (CA 8, 1954), 218 F. 2d 119, which referred to Selective Service regulations, the Court said:

“\* \* \* courts are not to weigh the evidence to determine whether the classification made by the draft boards was justified. And ‘justification’ exists

if the board's order is made in conformity with the regulations. \* \* \* If the order is not so made, jurisdiction is wanting. \* \* \*

What do the law and the regulations require?

Congress in 50 U.S.C.A. App. Sec. 456 (j) provided that no religious conscientious objector could be compelled to undergo combatant training and service, and that if any local board did not sustain such claim for exemption such conscientious objector was "entitled to an appeal to the appropriate appeal board".

No regulation can be valid which derogates from the statute. Therefore, in order to ascertain the fact of conscientious objection and provide the machinery for appeal, 32 C.F.R. 1625.2 provides that "the local board may reopen and consider anew the classification \* \* \* upon the written request of the registrant \* \* \* if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification \* \* \*". The Court in *United States v. Vincelli* (CA 2, 1954), 216 F. 2d 681, made it clear that a local board cannot refuse to reopen arbitrarily. No local board can set itself above the Act of Congress without violating due process.

A. *The local board erred in refusing to reopen appellant's classification and meet his prima facie case set forth in the Form 150.*

Faced with a prima facie case by filing a Form 150, the local board had no choice but to reopen and

consider anew appellant's classification. It makes a mockery of the legislative purpose to suggest that the conscientious objector issue, a *subjective* question, is disposed of by passing a *physical* examination. Hopefully we have progressed beyond trial by ordeal! But the board in this case assumed that a question of sincerity and belief could be settled by a stethoscope! In *United States v. Zieber* (CA 3, 1947), 161 F. 2d 90, the Court said:

"If the Local Board did refuse to consider new or further information offered by Zieber and to include it in his cover sheet and to consider it in classifying him after it had been offered, or if the Local Board refused to receive new or further information which Zieber endeavored to offer to it, we think it is clear that he was denied due process of law. \* \* \*"

The Seventh Circuit case of *United States v. Peebles* (CA 7, 1955), 220 F. 2d 114, involved a registrant who two years after registering and after having passed his pre-induction physical examination asked for his Form 150. Note, however, that in the *Peebles* case, although the board refused to reopen, it did correctly send to registrant a letter that "the additional evidence submitted did not warrant the reopening of your case." The Board also noted in the file that he had had an agricultural deferment and had not claimed the conscientious objector status until *after* passing the pre-induction physical examination, and therefore was entitled only to a I-A. But the National Selective Service saw the error, and as the case reports:

“On April 16, 1953 General Hershey, National Director of the Selective Service System, wrote to the State Director in Indianapolis, pointing out that the *Local Board had failed to reopen* defendant’s classification *after receiving SSS Form 150*, and requested that this be done. The State Director then notified the Local Board it would be necessary to consider anew defendant’s classification and cancel the order for him to report for induction. \* \* \*”  
(Italics supplied)

In the *Peebles* case the local board promptly classified him in I-A, then gave Peebles a hearing, classified him again in I-A, which was confirmed by the appeal board. On trial for the failure to submit to induction, the Seventh Circuit said:

“Defendant, under due process, had a right to have the Board consider his evidence fairly and without prejudice. ‘A draft board loses jurisdiction when it proceeds arbitrarily and without due regard to the rights to which a registrant is entitled under the regulations. \* \* \*’”

Can any less be said of the appellant where the local board refused to reopen his classification and consider his evidence of sincerity and faith set forth in the Form 150? It is submitted that the procedure required in the *Peebles* case on the filing of the Form 150 should also have been required in the case at bar.

The permissive language of the regulations, “may reopen”, requires the use of sound discretion and a test of the asserted facts before a local board can be said to have a rational base for its decision. Since this was wholly lacking in the case at bar, it follows that the local board erred; the way was blocked for a hearing

before the local board, and an appeal (as guaranteed by the Act of Congress) was thwarted; and any subsequent order by the local board became void for want of jurisdiction.

*B. The local board erred in failing to write the appellant a letter stating its decision.*

It is elemental due process that a party is entitled to notice of any decision directly affecting him. In harmony therewith the Selective Service regulations (32 C.F.R. 1625.4), when the decision is adverse to a registrant, provide:

“When a registrant \* \* \* files with the local board a written request to reopen and consider anew the registrant’s classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified, or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant’s classification, it shall not reopen the registrant’s classification. In such a case, the local board, *by letter*, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant’s classification and shall place a copy of the letter in the registrant’s file. \* \* \*” (Italics supplied)

A Form 150 is in terms a written request for change in classification. Implicit in the above quoted portion of the Regulations is a directive to the local board to examine the evidence submitted to it and bearing on a registrant’s change of status; otherwise it would be meaningless.

In the case at bar the board did one of two things—either it failed to consider the appellant's request for change of classification to that of conscientious objector, or it failed to find sufficient reason therein to warrant such change. If the first be the fact, then the board acted arbitrarily and deprived the registrant of a right. If the second alternative was the one pursued, then the board acted arbitrarily in not reopening and considering the alleged change of status, since there is nothing in the record to offset the statement alleged in the application for reclassification as a conscientious objector.

Whatever the board did, it erred. The record shows that on receiving the Form 150 it made a decision on *non sequitur* grounds and buried it in the file without ever notifying the appellant, not even by telephone or by spoken word or by so much as a postcard. It certainly sent no letter, as required by the Regulations. Is this compliance? Is this even within the spirit of the law and the regulations? Can it be said that by such action the appellant was not deprived of a right?

For lack of notice of the board decision, if there were anything derogatory in his file, or if the board considered it to be such, he "never had a chance to explain the same". *Chernekov v. United States* (CA 9, 1955), 219 F. 2d 721, at 723.

A chain is no stronger than its weakest link. Failure to give notice by letter is complete failure to comply with the law and regulations. When this link breaks, the Selective Service chain from that point is broken, useless, void, and of no force and effect. *Kessler v. Strecker*

(1939), 307 U.S. 22, at 34, 83 L. Ed. 1082, 59 S. Ct. 694. "All the steps prescribed by statute, and by regulations having the force of law, shall be strictly taken before it can be held that a person has been lawfully inducted into the military service." *Ver Mehren v. Sirmyer* (CA 8, 1929), 36 F. 2d 876, at 881. "Failure to give the required notice was not a mere formal defect but deprived the registrant of a substantial right." *United States v. Fry* (CA 2, 1953), 203 F. 2d 638.

The prejudicial damage done to appellant is shown in that, if he had known of the decision before receiving the Order to Report for Induction he could have taken some action to protect himself. He could have done either or both of two things: (1) request a personal appearance before the local board (32 C.F.R. 1624.1 guarantees this), or, (2) appeal and set forth the grounds on which he believed the local board erred (32 C.F.R. 1626.12 grants this right). But while the appellant confidently was waiting for action on his Form 150 filed September 20, 1950, the local board disposed of it secretly September 26, 1950 and almost immediately on October 3, 1950 issued an induction order, thereby blocking any administrative remedy the appellant might have had. (32 C.F.R. 1625.2 (2)).

The question is whether a local board can circumvent the clear language of the statute and the regulations, thereby depriving a registrant of his rights to hearing and appeal. To state the question is to answer it. The failure to give notice is fatal.



C. *The local board erred in failing to take any affirmative action continuing the appellant in his earlier I-A classification or placing him in any other classification.*

Selective Service Regulations dealing with classification anew (32 C.F.R.) provide:

*“1625.11 Classification Considered Anew When Reopened.—*When the local board reopens the registrant’s classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

*“1625.12 Notice of Action When Classification Considered Anew.—*When the local board reopens the registrant’s classification, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.

*“1625.13 Right of Appeal Following Reopening of Classification.—*Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.”

For a long time it has been the policy of the Selective Service System that, when a local board gives to a registrant the special form for conscientious objectors and allows him to fill it out and file it after he has filed his classification questionnaire and where for the first

time he shows that he is a conscientious objector, this is considered to be a reopening of the case. This policy is indicated in *United States v. Packer* (CA 2, 1952), 200 F. 2d 540, reversed on other grounds in 346 U.S. 1.

Then came the decision in *United States v. Vincelli* (CA 2, 1954), 216 F. 2d 681, holding that 32 C.F.R. 1625.2 demanded an inquiry, and holding further that the official issuance of a Form 150 to a registrant was itself a reopening requiring a reclassification. The court said:

“\* \* \* This board, at least, began such a procedure when it sent the appellant the conscientious objector questionnaire. *That was itself a reopening*, \* \* \* and the vote of the board, though in terms a denial of a reopening, was in effect the denial of a reclassification on the merits after a reopening for their consideration. Consequently Selective Service Regulation 1625.11, 32 C.F.R. Section 1625.11, was applicable and *the board was required to classify him again* ‘in the same manner as if he had never before been classified’. This included ‘the same right of appearance before the local board and the same right of appeal as in the case of an original classification’. Selective Service Regulation 1625.13, 32 C.F.R. Section 1625.13. These are substantial rights and the board’s procedure in this instance by depriving the appellant of them, was a *denial of due process which made his I-A classification a nullity*. \* \* \*” (Italics supplied)

The Ninth Circuit in the earlier case of *Knox v. United States* (CA 9, 1952), 200 F. 2d 398, sensed the injustice of failure to take any affirmative action after a Form 150 had been filed, when it said at page 401:

“The significant disregard of the registrant’s procedural rights in this instance lies in the fact that

upon his personal appearance after classification he presented for the first time evidentiary matter in support of his formal claim to the conscientious objector status embodied in his questionnaire, and *no action appears to have been taken to classify him in light either of this evidence or of the showing contained in Form 150, later submitted.* \* \* \*

“Classification by the local board is an indispensable step in the process of induction. *The registrant is entitled to have his claim considered and acted upon by these local bodies.* \* \* \*” (Italics supplied)

It follows that the appellant, when officially issued a Form 150 which he duly filed, was in law granted a reopening of his classification. The decision of the board, never communicated to the appellant, was in effect a denial of reclassification into I-O. This, in turn, called for a new and original classification into I-A together with the right to a personal appearance before the local board and a right of appeal. Having failed to take such affirmative action, the local board denied to the appellant due process of law which made his I-A classification a nullity.

D. *The local board erred, after reopening appellant's classification, in failing to make any entry on the back of the Form 100 of its decision.*

After reopening a classification, the Selective Service Regulations require a minute thereof on the back of the Classification Questionnaire (Form 100).

32 C.F.R. 1623.4 (d) and (e), provide as follows:

“(d) When the local board classifies or changes the classification of a registrant, it shall record such

classification on the Classification Questionnaire (SSS Form No. 100), the Classification Record (SSS Form No. 102), and in the space provided therefor on the face of the Cover Sheet (SSS Form No. 101).

“(e) When the Notice of Classification (SSS Form No. 110), is mailed, the date of mailing such notice shall be entered on the Classification Record (SSS Form No. 102) and on the Classification Questionnaire (SSS Form No. 100). \* \* \*”

In the case at bar none of these things was done, thereby leaving the record in such improper shape as to deprive the appellant of a personal appearance and an appeal, when in fact the regulations confer them as a matter of right, and the Act of Congress specifically grants the right of appeal to conscientious objectors.

Very valuable rights were taken away from Stain when the board failed to notify him of its decision of September 26, 1950. The right to a personal appearance is a vital one; it is his last chance to appear in person before his judges and plead his cause. *Knox v. United States* (CA 9, 1952), 200 F. 2d 398. The deprivation of the right to a personal appearance has been held enough to invalidate a draft board order. *United States v. Romano* (S.D.N.Y., 1952), 103 F. Supp. 597; *United States v. Peterson* (N.D. Calif. S.D., 1944), 53 F. Supp. 760; *United States v. Laier* (N.D. Calif. S.D., 1943), 52 F. Supp. 392.

Furthermore, the local board so manipulated the appellant's file that he was denied a right of appeal,—a statutory right given by Congress especially to conscientious objectors. See Sec. 6 (j) of the Act. No regulation

or order is valid which deprives the appellant of this right intended for him by Congress.

It is respectfully submitted, therefore, that the local board deprived appellant of procedural due process of law when it refused to reopen his case and reclassify him upon the filing of the Special Form for Conscientious Objector. Moreover, the local board deprived the appellant of another right when it failed to notify him of its action in failing to reopen his case and reclassify him after the filing of the Special Form for Conscientious Objector, thereby precluding him from a right to a personal appearance before the local board and a right of appeal guaranteed by Act of Congress.

## **CONCLUSION**

It is respectfully contended that the judgment of conviction in this case should be reversed, and the trial court should be directed to sustain the motion for judgment of acquittal and discharge the appellant.

Respectfully submitted,

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September 1955.



**In the United States**  
**Court of Appeals**  
**for the Ninth Circuit**

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ALBERT STAIN,  
vs. Appellant,

UNITED STATES OF AMERICA,  
Appellee.

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**APPELLEE'S BRIEF**

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Appeal from Judgment of Conviction by the United States  
District Court for the District of Oregon

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C. E. LUCKEY,  
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Assistant United States Attorney  
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FILED

OCT 25 1955

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**No. 14774**

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**In the United States  
Court of Appeals  
for the Ninth Circuit**

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ALBERT STAIN,                      Appellant,  
vs.

UNITED STATES OF AMERICA,  
Appellee.

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**APPELLEE'S BRIEF**

---

Appeal from Judgment of Conviction by the United States  
District Court for the District of Oregon

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**STATEMENT OF THE CASE**

The appellant was tried by the Court, a jury having been duly waived, in the District Court for the District of Oregon on an indictment in one Count charging his violation of the Universal Military Training and Service Act, Title 50, USC Sec. 462, by wilfully refusing to submit to induction into the armed forces of the United States. At the beginning of the trial, it was stipulated that the appellant had been classified in class I-A by a Selective Service Board in the

State of Oregon which had jurisdiction over his classification, that he was thereafter ordered to report for induction into the armed forces on October 18, 1950, that he reported as ordered and at that time refused to submit to induction. It was further stipulated that the official Selective Service jacket covering the appellant's registration be introduced into evidence as government Exhibit No. 1. With the receipt of Exhibit No. 1, the government rested.

The appellant testified in his own behalf and no other witnesses were called. At the close of his case, appellant moved the Court for a judgment of acquittal upon six grounds (Tr. 27). It is from the denial of this motion and from the judgment and commitment entered April 21, 1955 that this appeal is taken.

Because the chronology of events leading up to this violation is of the utmost importance, it will be reviewed briefly here.

The appellant was born in Salem, Oregon in 1928 and first registered with the Selective Service system at Salem, Oregon on November 6, 1946. He made no claim at that time that he was a conscientious objector. Nor did he request that he be furnished with the Special Form 150 for the purpose of describing a claim to conscientious objector status. A short time after his registration he moved to Canada with his parents and took up residence there. On November 27, 1946 he was classified by his local board in class I-A and

a notification of this classification mailed to him. At no time did the appellant claim that he was a conscientious objector, nor did he ever appeal from the classification given him during this first registration. During February of 1947 the appellant notified his local board at Salem that he had changed his address and had moved to Canada.

The appellant thereafter returned to the United States and again took up residence in Salem, Oregon where on January 5, 1949 he again registered with a local board, this time under the Selective Training and Service Act of 1948. On February 14, 1949 he was classified in class I-A and on February 17, 1949 was notified of this classification (Tr. 34). Over 18 months later on August 18, 1950 the appellant was ordered to report for his preinduction physical examination. He thereafter did report and was found to be physically fit for service. One month later, September 19, 1950, the appellant, for the first time since his original registration some four years before, asserted that he was conscientiously opposed to participation in war by reason of his religious training and belief. And it was on that date, September 19, 1950, that he asked for and received from the draft board a Form 150 on which he could state the reasons why he felt he should be given a classification other than I-A. On September 26, 1950 there was placed in the appellant's file a notation that the board had decided not to reopen the matter of his classification. On October 3, 1950 the appellant was ordered to report for induction and on October 18, 1950 he

appeared at the induction station and refused to be inducted.

After this matter was received in the United States Attorney's office for possible criminal prosecution, information was received by Selective Service Headquarters and the United States Attorney that the appellant would voluntarily submit himself for induction. On February 10, 1951 he was requested by letter to report for induction and on February 14, 1951 he advised his local board that he would not report. He was thereafter indicted, tried and convicted, and from that conviction appeals.

### ARGUMENT

Appellant's brief is divided into three main sections, each describing an alleged error on the part of the local draft board which appellant claims deprived him of various rights under the law and regulations and resulted in the denial of procedural due process. Before discussing individually the points raised in appellant's brief, we wish here to present the government's contention that the trial Court committed no error in either its denial of appellant's motion or in its finding of guilty for the reason that the appellant was not entitled to have his classification reviewed by the Court and having stipulated that he was classified, ordered to report for induction and wilfully refused to be inducted, and having offered no defense other than that he was improperly classified, the Court had no alternative but to find that he was guilty as charged in the indictment.

The cases on this subject uniformly have held that a registrant has no right to have his classification reviewed by the Court in the criminal proceeding growing out of his refusal to be inducted unless he has exhausted all of his administrative remedies. The appellant here, although classified in class I-A in 1946 and again in 1949, never appealed that classification, nor did he ever request a personal appearance before the draft board for the purpose of explaining any deferment or reason for a classification other than I-A.

This Court had the same question before it in the case of *Williams vs. United States*, 203 F2d 85, Cert. denied 345 US 1003. The appellant in that case contended that the District Court erred in refusing to admit evidence that he had not been given a full, fair and impartial hearing by his local board and in refusing to review his classification. This Court there held that the District Court had not erred, and since he had not appealed the ruling of the board at the administrative level, he could not now be heard to object to his classification. The following language is particularly applicable here:

“The administrative trial of the issues was before the Board. The Board ruled adversely to the appellant’s claim and he did not avail himself of the right to appeal. After intentionally refusing to conform to the order of the Board the Selectee may not challenge his classification in the criminal prosecution for his failing to do so, since he also failed to pursue the appellate steps provided by the Selective Service Act. *Falbo vs.*

*United States*, 1944, 320 US 549.” (203 F. (2) 85 at p. 87)

The *Williams* case also applies on another point raised by the appellant here relative to the local board's refusal to reopen appellant's classification and reclassify him. Williams registered with his local board September 7, 1948. He requested and received a conscientious objector form which he filed on November 1, 1948. On August 8, 1950 he was classified in I-A. He thereafter requested a personal hearing, and on September 1, 1950, after his hearing had been held, he was notified that his request for a conscientious objector classification had been denied and that he had been retained in class I-A. He did not appeal. On October 2, 1950 he was given an armed forces physical examination and found physically fit for service. The next day, October 3, 1950, he handed the clerk of his local board his statement in writing that he had been married since July 13, 1950. On appeal he asserted that the board had exceeded its jurisdiction by not ruling on his marital status and thereby prevented him from appealing from his classification in I-A.

This Court in dealing with that contention stated that, assuming the written information regarding his marital status constituted a sufficient written request for reclassification, *it came too late*. The following language quoted in part appears in the Selective Service Regulations:



"Each classified registrant \* \* \* shall, within ten days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, martial, military or dependency status, or in his physical condition." \* \* \* (32 CFR Sec. 1625.1)

This Court in the *Williams* case went on to state the registrant's failure to notify the local board of his change in marital status within the time allowed constituted a waiver of any claim for deferment on the basis of such change in status.

The same situation exists in the case at bar. Here the appellant claims that the local board's refusal to reopen his file and consider his claim for reclassification as a conscientious objector deprived him of his right to appeal the classification, and his right to a personal appearance. But what appellant has overlooked is that his request for reclassification, if it can be classed as such, came much too late and the local board was not required to consider it. The local board put a notation in his Selective Service file on September 26, 1950, which in effect said just that. It said that the registrant, having made no objection to his classification, and having proceeded up to and through the physical examination stage of the induction process, can not now be heard to complain that his classification was incorrect. If this Court considered

a two-month lapse between classification and a request for reclassification too long a time under the regulations in the *Williams* case, certainly in the instant case a lapse of a year and a half, not to mention the prior classification in 1946, would be "too late" to expect the local board to reopen, reconsider and reclassify the appellant.

In reaching its decision not to reclassify the appellant, the local board was certainly not unmindful of the events that were taking place in the world at that time. Renewing these events briefly, it will be seen that Stain left the country very shortly after his first registration, November 6, 1946. On October 15, 1946 further inductions under the Selective Training and Service Act of 1940 had been suspended. Appellant registered again under the 1948 Act January 5, 1949, at a time when inductions were at a minimum. Then in June, 1950, began the Korean War and its resultant steep increase in inductions. In August, 1950, appellant was ordered to report for his physical examination and then for the first time did he assert that he was conscientiously opposed to participation in war due to his religious training and belief. That claim of conscientious objections was made almost four years after his first classification in I-A. It is submitted that the draft board was certainly justified in taking these circumstances into consideration in attempting to decide whether or not this registrant's classification should be reopened and his much delayed claim of exemption considered.

The lapse of time between the appellant's two classifications and his eventual assertion of a claim to conscientious objector status should be considered also in the light of his testimony at the trial. On direct examination he was asked where he got his conscientious objector beliefs, and he answered, "I have always had them—from the teaching of my folks and—well, it would be from childhood." (Tr. 21). That answer seems quite inconsistent with the appellant's failure to assert his conscientious objector beliefs until a year and a half after his latest classification at a time when he had taken his preinduction physical examination and at a time when the Korean War was well under way.

### APPELLANT'S CONTENTIONS

The appellant claims in Contention No. I that he was deprived of his right to a personal appearance before his local board and that he was also deprived of his right of appeal from his I-A classification (Appellant's Brief, page 4). These statements appear to be inconsistent with the facts. On the reverse side of the Selective Service System Form 100 Classification Questionnaire filled out by the registrant in 1949 there appears a minute entry as follows: "2-17-49—Class I-A SSS Form No. 110 mailed to registrant" (Tr. 34). Selective Service System Form 110 is a standard classification form which advises registrant of the class into which he has been placed. It is authorized by Title 32, CFR Sec. 1626.2 (c) (1). Part of the Form 110 shows the Selective

Service class of the registrant and he is required to carry this card on his person. Form 110 contains in addition the following information:

“Notice of right to appeal.

“Appeal from classification by local board must be made within ten days after the mailing of this notice by filing a written notice of appeal with the local board.

“Within the same ten-day period you may file a written request for personal appearance before the local board. If this is done, the time in which you may appeal is extended to ten days from the date of mailing the new notice of classification after such personal appearance.”

The appellant received two of these forms containing the above quoted notice of right to appeal and right to personal appearance, one after his 1946 classification and one was mailed to him February 17, 1949 after his most recent classification. However, despite this notice, at no time did he appeal nor did he request a personal appearance before his board.

The doctrine that a registrant who fails to exhaust all of the administrative remedies accorded him under the Selective Service Act has waived any claim which he may have to a classification other than I-A is not new to this Court. In the case of *Olinger vs. Patridge*, 196 F2d 986, the registrant did not appeal his I-A classification within ten days and

made no effort to appear and discuss his classification until two years later, when upon the receipt of a notice to report for a physical examination, he appeared at his draft board and orally requested reclassification. In that case this Court stated:

“The authorities are all to the effect that the judicial machinery may not be invoked until all administrative remedies have been unsuccessfully pursued. (Citing *Johnson vs. United States*, 126 F2d 242,) “Olinger’s inaction does not exhaust his administrative remedies, but rather amounts to a waiver of any rights which he may have claimed under the Selective Service Act.” (196 F2d 986 at p. 987)

Likewise in the *Williams* case cited above, it was held that the failure of the registrant to notify his local board of a change in his status within the time allowed constituted a waiver of any claim toward deferment on the basis of such change of status.

In the Eighth Circuit case of *Van Bibber vs. United States*, 151 F2d 444, the defendant failed to make an administrative appeal. The Court there stated:

“Where a registrant disagrees with his board’s classification and desires to have it changed, he must resort to the administrative remedies afforded him by the Act and the Selective Service Regulations at that stage of the Selective process. \* \* \* ‘The registrant may,’ as the *Falbo* case (*Falbo vs. U. S.*) points out \* \* \* ‘contest his classification by a personal appearance before

the local board and if the board refuses to alter the classification, by carrying his case to a board of appeal and thence in certain circumstances to the President.' If he does not resort to these administrative remedies or if his efforts to change his classification fail, he has no legal right to refuse to obey an order of his board to report. *Only when he has exhausted his administrative remedies, has been ordered by his board to report for induction, has obeyed that order and has been finally accepted for service, are the doors of the Courts open to him to test the legality of his classification.*" (151 F2d 444 at 446) Emphasis added.

Again the Eighth Circuit in *Johnson vs. United States*, 126 F2d 242, held that the Act and Regulations afford the registrant a proper and sufficient remedy by giving him a right to an appeal to the appeal board which has the power to undo any injustice or any mistake in classification, and the registrant *must* take an appeal as a further step in the administrative remedy open to him. It is only when administrative remedies have been exhausted that the Courts are available.

See also *United States vs. Dorn*, 121 F. Supp. 171, and *Mason vs. United States*, 218 F2d 375.

In appellant's Contention No. II he states that there was no basis in fact for his classification of I-A. Appellant, however, is overlooking the fact that the burden rests with the registrant to furnish information to his local board sufficient to warrant his being placed in a classification other than I-A.

This opportunity is given to every registrant in the classification questionnaire which he fills out at his registration. Series XIV in that form asks him if he is a conscientious objector, (Tr. 30) and it is incumbent upon the registrant to assert his claim to a classification other than I-A if he has one and to do it promptly. This was not done by the appellant until after he had been given his preinduction physical examination and found acceptable for military service, and at a time when the draft board was not required to give consideration to such a claim for reclassification.

It is the government's position that under the doctrine of the *Williams* case, *supra*, and the other cases cited in the Argument, the appellant is in no position to raise the point that the draft board acted without any basis in fact or to ask the Court to examine his classification in any other way, for he has not exhausted the administrative remedies given him under the Selective Service Act. As has been pointed out earlier, the cases uniformly hold that the registrant must exhaust these remedies before he can ask the courts to review.

Again in his Contention No. 3 the appellant attacks the Order to Report for Induction on procedural grounds, stating that the draft board has denied him his right to a personal appearance and his right to appeal. But we have already seen that after both registrations this appellant was notified of his classification on a form which contains a written notice that he has a right of appeal and a right to personal appearance which he must exercise promptly.

Both under Contentions No. 2 and No. 3 the appellant cites the case of *United States vs. Vincelli*, 216 F.2d 681, but it is the government's position that the *Vincelli* case differs so greatly from the case at bar that it is easily distinguishable and in fact was distinguished by the Court of Appeals for the Second Circuit in the decision itself when that Court discussed the *Williams* case, *supra*, and the case of *United States vs. Rubenstein*, 166 F.2d 249.

In the *Vincelli* case the registrant was classified I-A and made no claim that he was a conscientious objector. He thereafter became a Jehovah's Witness and wrote his draft board a letter stating that he wished to appeal from his I-A classification because he had become a Jehovah's Witness and was now a conscientious objector, whereupon the draft board sent him a Form 150 which he filled out and filed. Thereafter the board, considering the material submitted, voted unanimously not to reopen his classification and not to reclassify him as a conscientious objector and without notice to the registrant forwarded his file to the State Appeal Board. The registrant there claimed that the draft board had reopened his file, considered the merits of his conscientious objector claim, and had voted not to reclassify him and that thereafter had forwarded his file to the appeal board without any notice to him, thereby denying him his right to personal appearance on the new classification. The government contended that the *Vincelli* case fell within the rule of *Williams vs. United States*, *supra*, and the Court then dis-



tinguished between the *Williams* and *Vincelli* cases in the following manner:

"We will assume *arguendo* that had the Local Board refused to reopen the appellant's classification on the ground that his application was too late and that his right to reclassification had been waived, the failure to notify him of its action would have denied him no substantial rights on appeal since an appeal would, by hypothesis, have been frivolous. But in the view of the Board's action which we interpret as a reopening and a denial of reclassification on the merits, it is now too late for the appellee to assert a previous waiver by the appellant of his right to have that done. \* \* \* *Having undertaken to consider his application on the merits, the Local Board was bound to do that in the manner procedural due process required.*" (216 F.2d 681.) Emphasis added.

In the case at bar there was no reopening and no consideration of the merits of the appellant's claim to conscientious objector status. The draft board made this very clear when it placed in his file on September 26, 1950, the statement that inasmuch as the appellant had been given a physical examination and found acceptable without protest, in other words had progressed that far in the induction process, the matter of his classification could not be reopened. At no time is there any indication that this local board ever considered his claim to conscientious objector status on the merits, nor was it required to do so.

## CONCLUSION

The foregoing review of the facts in this case, together with the discussion of the law applicable as announced many times by this Court, makes inescapable the conclusion that the appellant was given ample opportunity to assert whatever claim he may have had to conscientious objector status during the course of his classification in 1946 and again in 1949 and although he claimed at the time of the trial to have had religious convictions against participation in war since childhood, he saw fit to raise no objections to his I-A classification until he reached the brink of induction and there was an excellent possibility that he might be called upon to serve his country due to the outbreak of the Korean War. There appears to be little question that under the law and applicable regulations this draft board was fully justified in refusing to consider the appellant's eleventh hour claim to reclassification and their statement in his file clearly reflects that his file would not be reopened because his claim was asserted much too late.

It is fundamental to the administrative process created by the Selective Training and Service Act and regulations that the burden of establishing a claim to exemption or classification other than Class I-A at all times rests with the registrant. It is equally well established that such claims must be asserted promptly in order that they may receive the thorough consideration required by the Act. It appears obvious that the Congress never intended that the selective

process be interrupted and delayed whenever a registrant felt that his induction was imminent and he would like to have his case reopened. Such a warped construction of the intent of Congress and of the Act and regulations would immediately render the Selective Service process wholly ineffective to supply this nation with the manpower so essential to the maintenance of a strong and continuing defense.

Based upon the foregoing it is therefore respectfully submitted that the trial court did not err and that its judgment of conviction should be affirmed.

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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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ALBERT STAIN,

*Appellant,*

v.

UNITED STATES OF AMERICA,

*Appellee.*

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**REPLY BRIEF OF APPELLANT**

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*Appeal from Judgment of Conviction by the United  
States District Court for the District of Oregon.*

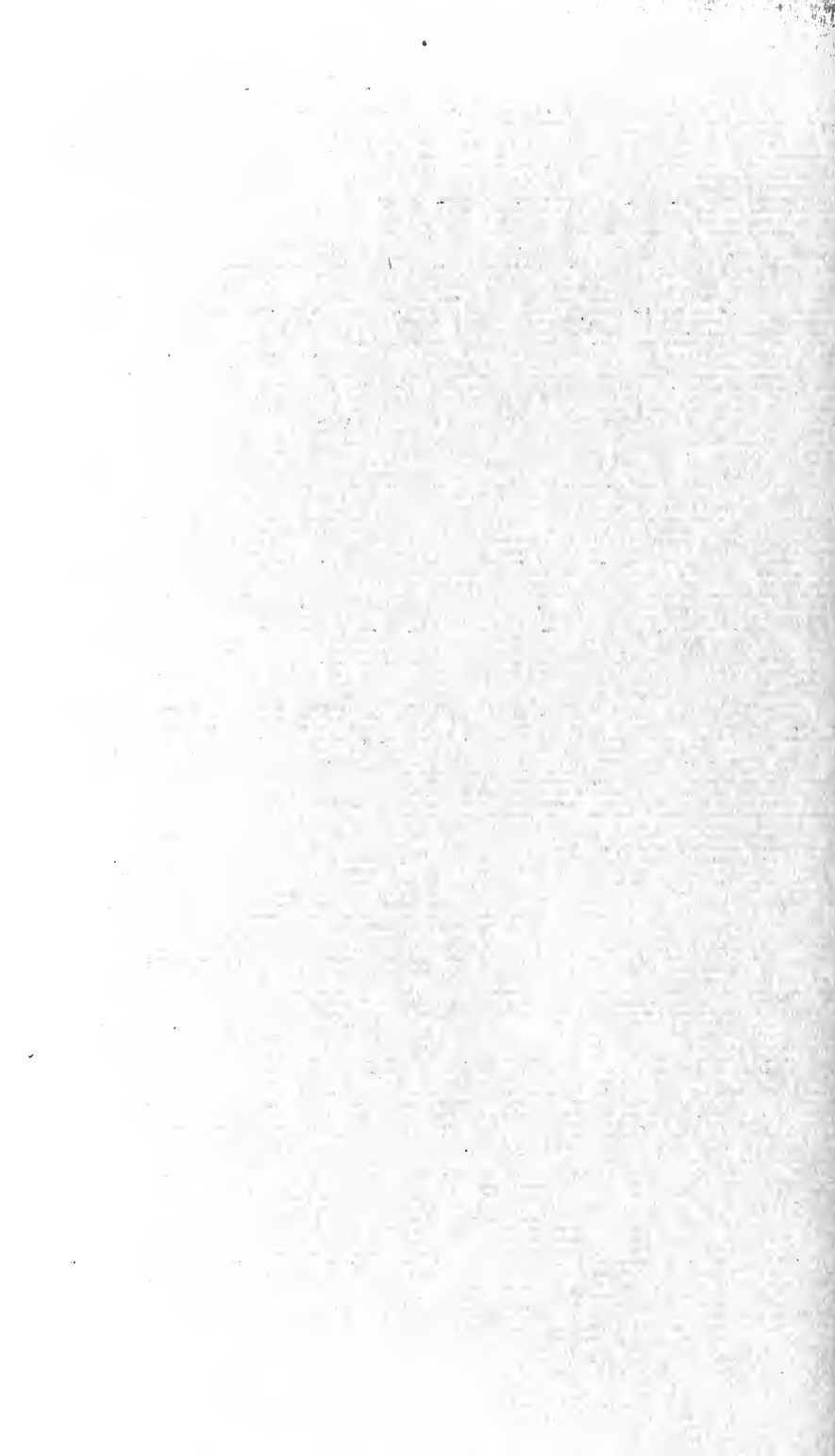
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**United States**  
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ALBERT STAIN,

*Appellant,*

v.

UNITED STATES OF AMERICA,

*Appellee.*

---

**REPLY BRIEF OF APPELLANT**

---

*Appeal from Judgment of Conviction by the United  
States District Court for the District of Oregon.*

---

The appellant, by way of reply, will deal only with the major errors in the Government's brief. Two contentions are made therein:

1. The filing of the Form 150 by the appellant was too late, and therefore the claim of being a conscientious objector had been waived.
2. By failing to appeal within the 10-day period in 1949 immediately following his I-A classification, the appellant failed to exhaust all of his administrative remedies.

Both of these the appellant denies.

## I.

**TIMELINESS OF THE FORM 150**

The appellee cites no case in which a Form 150 was held to have been filed too late. Indeed, so long as it is filed before the Order to Report for Induction is mailed, it is timely and must be considered. (Compare *United States v. Underwood*, Crim. No. 17,246, E.D. Pa., March 7, 1955, .....F. Supp. .... [see Appendix 1], where the court rejected the Government's argument on timeliness and waiver, and held that a claim of conscientious objection made *after* the Order to Report for Induction but before induction was still timely and that there had been no waiver of the privilege.) The case of *Williams v. United States* (C.A. 9, 1953), 203 F. 2d 85, cited by the Government, questioned the timeliness of the filing of a claim for a *marital* status, a totally different matter for which Congress has not seen fit to provide categorical exemption from military service. Furthermore, an appeal had not been taken; in the instant case none could have been.

The validity of the Government's argument (pp. 6-9, appellee's brief) depends on the construction placed on 32 C.F.R. 1625.1(b), quoted in part at page 7 of its brief. This section by its very terms refers to the special case of a person who is *already deferred or exempt* by reasons such as occupational, marital, dependency, military, or physical. It is in the interests of the Selective Service Administration that those no longer entitled to deferment or exemption should be compelled to divulge

that information, and promptly within ten days after change of status. But no harm is done the Administration by the failure of those *not yet* deferred or exempt to notify it of any change in status entitling them to deferment. This section gives as illustrations of its applicability those involving deferment who cease to be exempt; it does not mention anything about a person who is classified as liable to military service, such as the appellant.

Prosecutions for violations of Section 1625.1(b) have never been instituted against one who failed to claim exemption within the 10-day period after the change in status occurred. Quite the contrary, all prosecutions under this section have been for hiding the fact that the right to deferment or exemption has ended. *Candler v. United States* (C.A. 5, 1944), 146 F. 2d 424.

Further light is shed on the proper interpretation of section 1625.1(b) by the other provisions that "no classification is permanent" (32 C.F.R. 1625.1(a)), that "the local board will receive and consider all information, pertinent to the classification of a registrant, presented to it" (32 C.F.R. 1622.1(c)), and that nowhere in the Act does it provide that unless the registrant makes his claim to conscientious objection within ten days after receiving his classification card he thereafter waives his right to the privilege. (Compare *United States v. Brown*, N.J., March 15, 1955, Crim. No. 240-54, .... F. Supp. .... ; opinion set forth in Appendix 2.)

Appellant all these years had been I-A subject to immediate military service. To process his claim for ex-

emption under section 1625.1(b) defies the intent of that regulation as well as of Congress when it prescribed "a system of selection which is fair and just" (50 USCA 451(c) ) and then further provided specifically for the exemption of conscientious objectors (50 USCA 456 (j) ). Statutes and regulations are to be strictly construed against the Government which drafted them, and liberally in favor of registrants who are not lawyers or skilled in statutory interpretation. Registrants must not be treated like litigants assisted by counsel. *United States ex rel. Berman v. Craig* (C.A. 3, 1953), 207 F. 2d 888; *United States v. Derstine* (E.D. Pa., 1954), 129 F. Supp. 117.

Rather, the general provisions of 32 C.F.R. 1625.2 apply, quoted on page 9 of appellant's main brief. There is no time limit starting with any particular event (as the Government claims) for reopening and considering anew the classification of a registrant—only a terminal date marked by the mailing to the registrant of an Order to Report for Induction. Such Order was mailed to the appellant on October 3, 1950, and therefore the appellant's request for a change in classification, made orally on September 14, 1950, and in writing by the filing on September 20, 1950 of the Form 150 issued officially to him by the local board, was timely.

The Government, in recounting the historical events of the time, overlooks the true perspective through the eyes of the draft boards and the registrants. Until the autumn of 1950 the draft law was in the doldrums. *Ex parte Fabiani*, 105 F. Supp. 139 (E.D. Pa., 1952).

The appellant, in common with thousands of other registrants had not notified the board of any desire to change the classification. For, being inarticulate and "mildly inadequate" (according to Dr. Dickel, the psychiatrist who examined him) (Ex. No. 1), he thought he had taken the right steps to protect his rights. At least the results were right. Ever since childhood he had had his conscientious objections to military service, and ever since registering for the draft he had not been called upon to serve contrary to his beliefs. His is not a case of "foxhole religion"; long before 1950 he had held these views. Not being able to understand his theoretical predicament, he was only aware that his beliefs were not being violated and that this had gone on for years.

And he was not alone in this. During the years following 1946, when the appellant registered for the first time, scores of thousands of other registrants married, acquired dependents, were elected to office, entered deferred or exempt occupations, or acquired beliefs as conscientious objectors. Very few indeed did anything to bring their draft board records up to date, because the draft law was shriveling. When the Korean conflict broke out in June 1950, those scores of thousands who found themselves liable to military service then made their correct status known. They were not treated as deferred or exempt and therefore falling within 32 C.F.R. 1625.1(b) requiring notice within ten days of change of status; neither should the appellant. See *United States v. Vincelli* (C.A. 2, 1954), 216 F. 2d 681; *Schuman v. United States* (C.A. 9, 1953), 208 F. 2d 801.

In fact, the appellant told his plight to the Selective Service person he first met after it became apparent at the pre-induction physical examination that his beliefs were not going to be respected without something further. This was to him the first inkling that things were not going correctly according to his faith. Fortunately, the advice given was both good and correct,—to request a Form 150 and file it. And he acted immediately on it. Having made this claim before the Order to Report for Induction, it was timely under 32 C.F.R. 1625.2 for the appellant as well as for the scores of thousands of other registrants. That section of the Regulations carries no 10-day limit, and it flies in the teeth of legislative construction to intrude it.

The trend is now to require strict compliance by administrative bodies “with every procedural requirement \* \* \* essential to the board’s jurisdiction and the validity of its orders.” *Olvera v. United States* (C.A. 5, 1955), 223 F. 2d 880. Olvera, like the appellant, after having passed his pre-induction physical examination filed a request for a reopening and reclassification to an exempt status. The board said that “it was not mandatory on it to reopen the classification” and that “they declined to do so.” As in the appellant’s case, Olvera was not notified of this decision, and therefore no appeal was taken. When he received his Order to Report, he refused. The court held that the action of the board \* \* \*

“\* \* \* was arbitrary and unreasonable and ousted it of its jurisdiction to proceed further against him until his request was granted or, for a *proper reason*, refused \* \* \*



“Here the failure to rule formally on the request to reopen and reclassify denied Olvera of his right to an appeal from this adverse action. In fact, Olvera was not even notified of his retention in Class I-A except that the local board ‘processed him for induction’.” (Italics supplied.)

The claim of Olvera was held to be timely and was controlled by Section 1625.2 in which the words “*may* reopen and consider anew” were construed to require the board to rule formally whether it reopened or not so that an appeal could later be laid. It follows that the same conclusion should be reached in the appellant’s case, and the Government’s argument should be rejected.

The claim of the Government that the appellant did not see fit to press his views until there was a danger of being inducted, does not conform to the facts. This is not a case of “draft board fever”; for all the evidence is to the effect that he had had these views since childhood. To deny him his I-O classification is a rejection of those who have grown up in this religious tradition. Are we to understand that the Government urges a preference for “foxhole” conscientious objectors?

## II.

### EXHAUSTION OF ADMINISTRATIVE REMEDIES

The second contention of the Government is that the appellant failed to exhaust his administrative remedies when he failed to appeal his I-A classification within ten days after February 17, 1949.

The appellant replies:

1. He did exhaust his administrative remedies when he filed his Form 150 prior to the mailing of the Order to Report for Induction, and while this matter was pending he was conclusively barred from further pursuit of such remedies by the issuance of a "final order" to report for induction.
2. Even if it be held that he did not exhaust his administrative remedies (which the appellant strenuously denies), it was not necessary that he do so in order to obtain an acquittal in this criminal prosecution.

#### **a. Appellant did exhaust his administrative remedies.**

In the summer of 1950, over a year after having been initially classified, the appellant was advised at the pre-induction physical examination for the first time that he had to fill out a different form (T. 25). The record shows that he requested that Form 150 on September 14, 1950, filed it on September 20, 1950, and then waited for board action. What more could he have done?

As the matter stood in August 1950, he could not have appealed,—the time had expired. Furthermore, his

record had to be completed in order to furnish a factual basis for a reopening of his classification. The course he took was the only practical and lawful administrative remedy open to him, and it was through no fault of his own that the Order to Report for Induction barred further relief. This was a "final" order within the meaning of the cases authorizing judicial review.

We have already shown that the Form 150 was filed in time; see pp. 2-7 of this brief. And since the claim was seasonably made, there can be no waiver.

It follows that the appellant did exhaust his administrative remedies and is entitled to have his conviction set aside.

**b. Exhaustion of administrative remedies is not necessary in this case.**

Even if it be held that appellant did not exhaust his administrative remedies — a holding which appellant would strenuously deny — the rule does not apply in a case like the one at bar.

We have already shown that the appellant made timely application to avail himself of the orderly procedures of Selective Service only to have it end in futility. The administrative agency with its specialized understanding which should have passed on his Form 150 and the request for reclassification, refused to do so and made its ruling secretly so as to preclude any orderly administrative review. It capped this irregular procedure by issuing an Order to Report for Induction, thereby closing the door to any further relief.

Professor Kenneth Culp Davis, the recognized authority, in his book, *Administrative Law* (West Publishing Co., 1951), says this of the exhaustion rule:

"The courts usually follow what the Supreme Court calls, 'the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted'. But even though the Supreme Court customarily states the rule without qualification, the courts in many cases relax the rule. To determine when the rule will be or should be applied or relaxed requires analysis not merely of holdings but also of reasons behind the holdings \* \* \*

"The principal reasons for requiring exhaustion of administrative remedies relate to efficient management and orderly procedure, use of the agency's specialized understanding, adequacy of legal remedies, exclusive jurisdiction, and statutory requirements of final order." (p. 615)

None of these reasons for requiring exhaustion exist in the present case.

Davis goes on to state the situations in which the exhaustion requirement shall not apply. We submit that the instant case falls squarely within these exceptions:

"When pursuing administrative remedies will cause irreparable injury, when administrative remedies are inadequate, or when the agency's action is unconstitutional or beyond its jurisdiction or clearly illegal, the courts sometimes relax the requirement that administrative remedies must be exhausted before the courts will intervene." (p. 621)

In the ensuing discussion Davis groups the cases and analyzes them.

In the instant case it is submitted that the following grounds make the exhaustion of administrative remedies unnecessary.

(1) *Lack of due process and clear error of law excuse exhaustion.*

Lack of due process is referred to as excusing the exhaustion of remedies in the Selective Service case of *Schwartz v. Strauss et al.* (C.A. 2, 1953), 206 F. 2d 767, and it is the basis of cases like *Skinner Corp. v. United States*, 249 U.S. 557, 63 L. Ed. 772 (1919), and *P.U.C. v. United Fuel Gas Company et al.*, 317 U.S. 456, 87 L. Ed. 396 (1943), which relieved a party of the necessity of exhausting administrative remedies.

In *Ex parte Fabiani* (E.D. Pa., 1952), 105 F. Supp. 139, a medical student in Italy was allowed to defend against a I-A classification though he had not exhausted his administrative remedies. The court cited many cases where lack of due process and clear error of law were defenses to prosecution for selective service violations and concluded that exhaustion was excused under these cases.

*Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 314, 91 L. Ed. 308 (1946), lists reasons for holding Selective Service classifications invalid as including "deprivation of petitioner of basic and procedural safeguards" and "action without evidence to support its order". This is in accordance with general administrative law. The Selective Service cases require the most minute compliance with the statute, regulations and general

principles of fairness, as shown by the following cases in which convictions were reversed or refused:

United States v. Zieber (C.A. 3, 1947), 161 F. 2d 90 (proper classification procedure not followed; new information not considered).

Niznik v. United States (C.A. 6, 1950), 184 F. 2d 972 (board showed prejudice).

United States v. Stiles (C.A. 3, 1948), 169 F. 2d 455 (proper classification procedure not followed).

It is clear from the statute, the regulations and the file in this case that in the following respects the action of the Salem draft board in classifying appellant in I-A and refusing to consider his Form 150 or to reopen his case lacked the essentials of due process and represented clear errors of law:

- a) 32 C.F.R. 1622.14 and 50 U.S.C. 456 (j) make class I-O mandatory in this case—"in class I-O *shall* be placed" conscientious objectors to all military service.
- b) 32 C.F.R. 1622.1 requires the local board to "receive and consider *all* information, pertinent to the classification", and Section 1625.2 authorizes a reopening for the consideration of evidence not previously before it. The failure to do so in this case is a clear violation of the letter as well as the spirit of the regulations.
- c) 32 C.F.R. 1625.4 requires that "the local board, *by letter*, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file". The failure to do neither not only violated the regulations but also deprived the appellant of any notice—a clear and flagrant violation of due process.

- d) In the alternative, the local board under 32 C.F.R. 1625.11 et seq. was required to consider anew the classification, mail a new classification card, and allow the registrant a right of appearance and a right of appeal. Failure to do this deprived the appellant of substantial procedural rights under the law.
- e) The action of the local board in slipping into appellant's file secretly its decision not to reopen not only violated the regulations (section 1625.4) but also the most basic elements of due process.

(2) *The acceptance at the induction center was "final".*

When the order to report for induction was issued, it barred any further action by the appellant. Only a remote possibility of rejection at the induction center was left. Not even an appeal remained to him, since the Selective Service file was in such shape that there was no appealable decision, assuming that the appellant had known of the surreptitious notation (which, however, was impossible). A rehearing could have been asked, but this board had already disregarded the evidence in his file; they had refused to reopen his classification even though they had new information before them for the first time which established a prima facie case to the conscientious objector category.

The appellant did report to the induction center, and when he was accepted for military service but refused to take the step forward, further administrative relief was useless. He had exhausted his remedy.

- (3) *Inadequacy of administrative remedies and improbability of obtaining administrative relief excuse exhaustion.*

This is one of the most frequently recognized grounds for excusing exhaustion. See *Smith v. Illinois Bell Co.*, 270 U.S. 587, 70 L. Ed. 747 (1926), where the administrative agency had shown by past conduct that it would not act. In *City Bank Farmers' Trust Co. v. Schnader*, 291 U.S. 24, 78 L. Ed. 628 (1934), the Supreme Court did not require exhaustion where it was certain from previous action that the administrative officers would give an adverse decision.

In the instant case, the board had disregarded all the new evidence submitted to it; had not considered the evidence in their files; had acted secretly and adversely on the appellant's request to reopen; had failed to send any letter or notice to the appellant; and had not followed the regulations. It would have been pointless to have again asked the board to go through the same useless procedure. Exhaustion of such a remedy is excused.

- (4) *Exhaustion is not required where the purpose is not to gain an injunction or declaratory judgment, but is to defend a criminal or civil prosecution.*

Nearly all the cases demanding exhaustion are equitable injunction or declaratory judgment cases. A few Selective Service cases have made brief reference to exhaustion, but in none of them has the decision really rested on the requirement of exhaustion before allowing



the assertion of a defense of illegal administrative action in a criminal prosecution. *Falbo v. United States*, 320 U.S. 549, 88 L. Ed. 305 (1944); *Billings v. Truesdell*, 321 U.S. 542, 88 L. Ed. 917 (1945). And in *Estep v. United States*, 327 U.S. 114, 90 L. Ed. 567 (1946), the Supreme Court did not decide that a person must exhaust administrative remedies. The real issue was whether Selective Service classification could be reviewed in criminal prosecutions, and it was the unanimous decision that such review was constitutionally required.

In a series of recent cases various federal courts have made it clear that they understand the "exhaustion" rule does not apply to prevent assertion of the defense that the administrative order under which a defendant is being prosecuted is invalid.

In *Smith v. United States* (C.A. 1, 1952), 199 F. 2d 377, a landlord was permitted to defend on the basis that the rent order was invalid though he had not exhausted his administrative remedies:

"\* \* \* We are not aware of any general judge-made doctrine that a defendant in an enforcement suit, charged with having violated an administrative regulation or order, is precluded from setting up the defense that the regulation or order is invalid, merely because the defendant had failed to make use of an available administrative procedure by which he might have obtained administrative action to set aside the regulation or order."

It is believed that this is a sound rule, for a person who is going to be charged with a crime never owes an obligation to come forward and take affirmative action;

he need only defend; he need not even then affirmatively testify in his own case. To apply the exhaustion requirement to prevent an alleged criminal from making a defense violates the due process requirements of the constitution.

### III.

## **BUT THE GOVERNMENT ITSELF HAS FAILED TO EXHAUST THE ADMINISTRATIVE REMEDIES AND IS AS MUCH PRECLUDED FROM PROSECUTING AS APPELLANT IS PRECLUDED FROM DEFENDING.**

This brief has pointed out the respects in which the Government has failed to exhaust the administrative process. It has disregarded the new evidence set forth in the Form 150 submitted to the local board; it has not considered the evidence in their files; it has acted secretly and adversely on the appellant's request to reopen; it has failed to send any letter or notice to the appellant of its decision; it has failed to put the file in such order that an appeal could be taken,—all in contravention of the regulations. Had it properly completed the administrative process, the present proceeding would be unnecessary.

In both *United States Alkali Export Ass'n. v. United States*, 325 U.S. 196, 89 L. Ed. 1554 (1945), and *F.T.C. v. Claire Furnace Co.*, 274 U.S. 160, 71 L. Ed. 978 (1927), the Supreme Court recognized that the Government was subject to the same excuses for and the same

rules of exhaustion of administrative remedies as others.

If the Government can insist that the appellant has lost his defense—and a very essential defense it is, going to the very essence of appellant's constitutional rights—then *a fortiori* the Government has lost its right to prosecute. If the Government be allowed to prosecute but the appellant be denied the right to defend, then the Government has “trapped” the appellant. In contravention of all its duties it has given appellant an erroneous classification; it has deprived him of the right to rely on their obedience to their oath—to administer their duties impartially and as a public trust; it has told him to give up his religion or go to jail. This cannot be the law.

## CONCLUSION

It is submitted that the Government's contentions should not be sustained, that the judgment should be reversed and the cause remanded with instructions to sustain the motion for judgment of acquittal for each and every reason above stated and for the reasons stated in the main brief for appellant.

Respectfully submitted,

G. BERNHARD FEDDE,  
Counsel for Appellant.

Office and Post Office Address:  
1014 Weatherly Building,  
Portland 14, Oregon.

November 1955.



**APPENDIX I****IN THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	)	
	)	CRIMINAL
v.	)	
	)	No. 17,246
ROBERT ALLEN UNDERWOOD	)	

**OPINION**

GANNEY, J.

March 7, 1955

Defendant was indicted on April 29, 1953, under § 12 of the Universal Military Training and Service Act of 1948, 62 Stat. 622, 50 U.S.C.A. Appendix, § 462, for failing and refusing to be inducted into the Armed Forces of the United States at the Induction Center, Philadelphia, Pennsylvania, in violation of the Act and the rules and regulations made pursuant thereto.

On July 24, 1950, defendant registered under the provisions of the Act with Local Board 35, Toms River, New Jersey. On December 29, 1950, he was classified I-A and duly notified. On or about October 31, 1951, he was found to be physically acceptable by the Armed Forces examining board. Thereafter an Order to Report for Induction was mailed to him on May 5, 1952. The induction date was later postponed until July 21, 1952, to enable him to complete his junior year in high school. On the latter date he reported to the Induction Center but refused to be inducted. A few days thereafter Local Board 35 of Toms River received a letter from the Arm-

ed Forces Examining Station in Philadelphia stating that defendant refused to submit to induction on the ground that he is a member of Jehovah's Witnesses. This was the first time the local board knew of any claim as to defendant's professing to be a Jehovah's Witness or his possible stand as a conscientious objector.

Subsequently, on October 17, 1952, he inquired by letter to his local board as to whether it was permissible for him to fill in a conscientious objector application. His letter of January 20, 1953 to the board is as follows:

Dear board members,

I, Robert Underwood and a Witness of Jehovah God, am requesting a reconsideration of my classification. Being a Jehovah's Witness it would be contemptible and blasphemous to Almighty God if I were to engage in warfare, and so in complying with the laws of the land my only alternative is an appeal for I-O, Conscientious Objector.

Due to a misunderstanding of the legal procedures I failed to record my appeal at the set time for such, but urgently request forgiveness. If you decide to grant my petition at this time it will be considered a great favor in my behalf.

Supposing that you send me a Conscientious Objector's form, I will fill it out and return it by mail if satisfactory to you. Or upon your request I would gladly appear for interview.

It is entirely up to you and I await your decision.

In the latter part of January he sent letters to the draft board requesting a change in his classification and for an interview. By letter dated February 4, 1953, the draft board replied that it had communicated with the

proper authority<sup>1</sup> as to the advisability of reclassifying him and that they would notify him when it received the information. In March and April he again sent letters to the draft board requesting a change in his classification and for a hearing. The draft board in a letter dated July 10, 1953, advised the defendant that it did not have authority to make the reclassification.

Regulation 1625.2, CFR 1625.2, promulgated pursuant to the Act, entitled "*When registrant's classification may be reopened and considered anew.*" provides in pertinent part as follows: "The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant . . . or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." The local board has not made a specific finding that there had been such a change in the defendant's status.

On the basis of this regulation, the Government contends that the local board, after having mailed the Order to Report for Induction to the defendant, acted within

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<sup>1</sup> The "proper authority" was the U. S. Attorney's Office in Newark, New Jersey.

the law in not reopening his classification, regardless of the merits of his claim.

Regulation 1625.2 is clear. We believe § 6 (j) of the Act, 50 U.S.C.A. Appendix, § 456(j), is equally clear. That section provides: "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." It is plain that a person meeting the conditions of the above section of the Act is not to be subjected to combatant training and service. This privilege is not to be defeated by procedural regulations. Nowhere in the Act does it provide that unless the registrant makes his claim before notice of induction he thereafter waives his right to the privilege. Had Congress so intended, it would have set forth such intention in unmistakable terms. See *United States ex rel. Hull v. Statler*, 7 Cir. 1945, 151 F. 2d 633, 635; *United States v. Clark*, W.D. Pa., 1952, 105 F. Supp. 613, 615. Although in both of the cited cases the claim of conscientious objector was made prior to the time notice for induction was sent, the reasons given in support of the holdings apply to the present criminal action. However, in *United States v. Crawford*,<sup>2</sup> a case in which the registrant raised the claim of conscientious objector for the first time nine and a half months after he received an order to report for induction, District Judge Edward P. Murphy said: "... While regulation 1625.2 is not invalid on its face, it can have no applicability to a claim of

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<sup>2</sup> Criminal No. 33,742, N.D. Cal., S. D.....F. Supp.



conscientious objection, whenever made, so as to deprive the objector of a hearing at which he may prove his good faith.

“No such hearing having been offered defendant, the United States has not made the condition precedent to a prosecution for draft evasion.”

We are aware of the burden upon a registrant to establish his eligibility for deferment or exemption to the satisfaction of the local board. See *United States v. Scoebel*, C.A. 7, 1953, 201 F. 2d 31, 32. Nevertheless we think that the local board, when it received notice from the Armed Forces Examining Station of the reason of defendant's refusal to be inducted, should have sent notice to him at his registered address that it would grant him a hearing on the merits of his claim. If the notice of his refusal to be inducted should be considered insufficient, certainly defendant's letters from October 17, 1952 to the month of April, 1953 made the board cognizant of his claims of conscientious objector and that he desired a hearing concerning that claim. District Judge Grim's instructions in *United States v. Derstine*,<sup>3</sup> are appropo here:

“Registrants are ‘not to be treated as though they were engaged in formal litigation assisted by counsel.’ *United States ex rel. Berman v. Craig*, 207 F. 2d 888, 891 (C.A.3, 1953). Whenever a registrant in writing makes a request to a Local Board, no matter how ambiguously or unclearly the request is stated, if it indicat-

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<sup>3</sup> Criminal No. 16, 715, E. D. Pa., March 30, 1954,.....F. Supp.....

ed in any way a desire for a procedural right, the writing should be construed in favor of the registrant and the procedural right granted, or the registrant should be contacted by the Board to obtain clarification of what he had in mind when he made the request."

Accordingly, it is the verdict of this Court that the defendant, Robert Allen Underwood, is not guilty of the crime charged in the indictment.

Filed March 7, 1955.

**APPENDIX 2**

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	)	
	)	CRIMINAL
vs.	)	NO. 240-54
	)	OPINION
NELSON JULIUS BROWN.	)	

MEANEY, District Judge.

Defendant was indicted under U.S.C., Title 50, Appendix, sec. 462—Universal Military Training and Service Act—for knowingly failing and refusing to be inducted into the Armed Forces of the United States as so notified and ordered to do.

It appears that Brown was a registrant with Local Board #119 in Virginia, and on June 26, 1952 was reclassified I-A by that board. He had had a student deferment prior to that time. The board mailed a Notice of Classification (Form #110) to the defendant on June 27, 1952. An order to report for induction was sent on August 11, 1952. On August 10, 1952 Brown appeared at the office of Board #119 and revealed his claim of being a conscientious objector. Three days later he filed Form #150 (Special Form for Conscientious Objectors) with the board. On August 26, 1952 the board notified Brown that the information submitted by him was insufficient to warrant any reopening of his I-A classification. Brown was further advised that he would have to report for induction, as ordered, on August 28, 1952. Some time prior to August 28, 1952, defendant moved

to New Jersey and requested that his file be transferred there. This was done and Brown again refused to comply with the induction order on September 19, 1952. He was indicted for this refusal.

Brown waived trial by jury as provided by Rule 23 (a) of Fed. Rules Crim. Proc., 18 U.S.C.A. He also stipulated that the Selective Service file be considered in evidence, as well as his refusal to report for induction.

On December 7, 1954 trial was had in this court. The defendant took the stand and testified as to the foregoing facts. However, he claimed that all of the messages sent by the local board in Virginia subsequent to June, 1952 had to be forwarded to New Jersey where he maintains he was then residing. We do not find this important to our determination.

The counsel for the defendant at the conclusion of the case made a motion for entry of a judgment of acquittal. The court reserved decision. The following argument of law was made in support of the defense motion.

"I. It was the duty of the Local Board to reopen and consider anew the defendant's classification in view of the new and additional evidence filed with the Local Board, showing that defendant was a conscientious objector, and the failure to reopen, thereby providing for an appeal, was arbitrary and capricious. In the event that it is found that the Local Board did reopen the defendant's classification, the denial of the status of conscientious objector to the defendant was without basis in fact, arbitrary, capricious and contrary to law.

"II. The filing of the Special Form of Conscientious Objector constituted basis for reopening defendant's classification, and the Local Board's re-

fusal to reopen and reclassify the defendant was an abuse of discretion that nullified the Draft Board proceedings.”

The issue with which the court is confronted involves the validity of the local board's refusal to reopen Brown's classification after he filed Special Form for Conscientious Objectors (Form 150) on August 21, 1952, which was subsequent to the time defendant had been ordered to report for induction. 32 C.F.R. §1625.2 affects the situation here. This is the section which counsel agree is basically controlling and which was in effect at the time. It provides in part:

“1625.2 When registrant's classification may be reopened and considered anew. The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant \* \* \* if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.”

This section implicitly contains a direction to the board to examine the evidence submitted to it of change in the registrant's status. Otherwise it would be more or less meaningless. It is evident that the board did one of

two things—either it failed to consider the applicant's request for change of classification to that of conscientious objector, or it failed to find sufficient reason therein to warrant such change. If the first be the fact, then the board acted arbitrarily and deprived the registrant of a right. If the second alternative was the one pursued, then the board acted arbitrarily in not reopening and considering the alleged change of status, since there is nothing in the record to offset the statement alleged in the application for reclassification as a conscientious objector. *Dickinson v. U. S.*, 346 U.S. 389.

The Government's argument that by exposing himself voluntarily to the teachings of the Jehovah's Witnesses and then accepting them, a change in status resulted from circumstances over which Brown had control, and that he therefore would not be entitled to reopening and consideration of his classification, seems to this court to border on the naive. One does not compel religious conviction, and the operations of the human mind are as mysterious as they are unpredictable in the acceptance or non-acceptance of belief.

In view of the foregoing, this court is of the opinion that a judgment of acquittal should be entered.

Let an order in conformity with these findings be submitted.

\* \* \* \* \*

Filed March 15, 1955.

No. 14775

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ELMER J. THOMPSON, HELEN H. THOMPSON,

*Appellants,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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## APPELLANTS' OPENING BRIEF.

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FILED

OCT 12 1955

PAUL P. O'BRIEN, CLERK





No. 14775

IN THE

# United States Court of Appeals

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ELMER J. THOMPSON, HELEN H. THOMPSON,

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*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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## APPELLANTS' OPENING BRIEF.

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### Jurisdiction and Venue.

Appellants ELMER J. THOMPSON and HELEN H. THOMPSON, husband and wife, are residents of the County of Los Angeles, State of California, and have resided there continuously since prior to 1945. This controversy involves appellants' Federal Income Taxes for the year 1949. The appellants filed their Federal Income Tax Returns for the year 1949 in the Office of the Collector of Internal Revenue for the 6th Collection District of California, at Los Angeles, California. [Rec. pp. 1 and 7.]

Jurisdiction in this Court to review the decision of the Tax Court of the United States, entered January 10, 1955, finding a deficiency in the amount of \$150.00, for each appellant, in individual income taxes for the calendar year 1949, is founded on Sections 7482 and 7483 of the Internal Revenue Code of 1954 (formerly Secs. 1141 and 1142 of the 1939 Internal Revenue Code).

## Statement of the Case.

This controversy relates to the proper determination of appellants' Federal Income Taxes for the calendar year 1949. Respondent determined an Income Tax deficiency of \$150.00 for each appellant, for the calendar year 1949 by disallowing a claimed bad debt loss arising out of a transaction entered into in 1945 and 1946 with one JACK MILLER.

The Tax Court of the United States, by its said decision sustained respondent in his determination.

The facts in this case, upon which appellants rely in support of their appeal are briefly as follows:

1. On or about the 10th day of July, 1945, the taxpayer, Elmer J. Thompson, and Jack Miller executed a document entitled "Articles of Co-Partnership." This document provided for a limited partnership between the two parties for the purpose of engaging in the mining business in the State of Arizona, with the principal office and place of business in the County of Los Angeles, State of California; the name of the firm was to be "Miller Mining Co."; Jack Miller was to be the general partner and was to be entitled to seven-eighths ( $\frac{7}{8}$ ) of all of the profits of the partnership; the taxpayer, E. J. Thompson, was to be the limited partner and was to receive a one-eighth ( $\frac{1}{8}$ ) interest in and to all of the profits of the partnership; Elmer J. Thompson was to contribute the sum of six thousand five hundred dollars (\$6,500.00) for the said one-eighth ( $\frac{1}{8}$ ) interest. The document was apparently pre-typed with blank spaces being provided for filling in the date, the name of the limited partner, and the amount of the limited partner's contribution, these items

being written in in ink upon the executed document. [R. pp. 11-15, 34 and 46.]

2. On or about the 12th day of December, 1945, the taxpayer, E. J. Thompson, and Jack Miller executed a second document entitled "Articles of Co-Partnership." This was substantially identical in its provisions with the aforesaid document executed on July 10, 1945, except that the contribution of E. J. Thompson was to be six thousand dollars (\$6,000.00) for a one-eighth ( $\frac{1}{8}$ ) interest. The limited partner's name and the amount of the contribution were typed in in this document. On the last page of the document following the signatures was this statement: "This is to acknowledge the sale of additional ( $\frac{1}{8}$ ) interest in and to all of the profit of said partnership." The signature of Jack Miller was subscribed thereunder. [R. pp. 16-20, 34 and 46.]

3. The taxpayers advanced to the said Jack Miller, in reliance upon and in accordance with the provisions of the aforesaid purported limited partnership agreements, the total sum of fourteen thousand seven hundred dollars (\$14,700.00) on the dates and in the amounts set forth below:

<u>Date of</u> <u>Check</u>	<u>Type of Check</u>	<u>Amount</u> <u>of Check</u>
February 6, 1945,	Taxpayer's Personal	\$ 1,500.00
August 6, 1945,	Taxpayer's Personal	1,000.00
August 13, 1945,	Taxpayer's Personal	1,500.00
October 29, 1945,	Taxpayer's Personal	2,500.00
December 14, 1945,	Bank Cashier's Check	6,000.00
March 7, 1946,	Bank Cashier's Check	1,500.00
April 6, 1946,	Bank Cashier's Check	700.00
		<hr/>
		\$14,700.00

[Stipulation, p. 2; R. pp. 34-35 and 47.]

4. No Certificate of Limited Partnership for the purported limited partnership was ever executed, sworn to or acknowledged by the taxpayer. [R. p. 35.]

5. No Certificate of Limited Partnership was ever filed with the Clerk of Los Angeles County. [Pet. Ex. 4—Los Angeles County Clerk Certificate; R. pp. 35, 54.]

6. No permit authorizing the sale and issuance of securities was ever issued by the Department of Investment, Division of Corporations, State of California, to Jack Miller and/or Miller Mining Co., to and including May 21, 1954. [Pet. Ex. 6—Certificate of Commissioner of Corporations; R. pp. 36, 58.]

7. No financial statement or copies of partnership tax returns pertaining to the alleged partnership were ever received by the taxpayers. [R. pp. 35-36.]

8. No part of the aforesaid sums advanced by the taxpayers to Jack Miller in connection with the purported limited partnership was ever recovered by or returned to the taxpayers. [R. p. 35.]

9. The taxpayers were furnished information in the year 1947 by the said Jack Miller with respect to three allegedly then existing mines. [R. p. 35.]

10. The taxpayers' last contact with the said Jack Miller was sometime near the middle of the year 1947. [R. p. 36.]

11. The taxpayers believed, in the year 1947, on the basis of information received from Jack Miller, that they would get their money back.

12. The taxpayers believed, in the year 1948, that there was still a possibility of locating the said Jack Miller.

13. On the 12th day of July, 1945, a Certificate Under Uniform Partnership Act of Miller Mining Co. was filed with the County Clerk of the County of Los Angeles, the said Certificate showing Jack Miller to be the general partner and R. R. Crabtree to be the limited partner. [Pet. Ex. 4—Los Angeles County Clerk Certificate; R. pp. 54-57.]

14. Taxpayers offered in evidence a certified copy of the aforesaid Certificate Under Uniform Partnership Act, certified to by the Los Angeles County Clerk, but the Court sustained the respondent's objection to its admission.

15. Mr. Dan Jones, 3968 Wilshire Boulevard, Los Angeles, California, invested fourteen thousand dollars (\$14,000.00) with the said Jack Miller, in 1946, in a limited partnership known as the "Miller Mining Co.", for which and in which he was to receive a twenty-five per cent (25%) interest.

16. The taxpayers' United States Individual Income Tax Returns as filed for the years 1947 and 1948, in the office of the Collector of Internal Revenue, Los Angeles, California, disclose no capital gains. [Stipulation, p. 2; R. pp. 35, 47.]

### Questions Involved.

There are only two simple basic questions involved in this controversy:

1. Did appellants suffer a "bad debt" loss as a result of their transaction with the said Jack Miller?

2. If they suffered a "bad debt" loss, in what year did the loss occur?

### Specification of Errors.

The appellants hereby set forth the following assignments of error on the part of the Tax Court of the United States, on which they intend to rely:

- (1) The failure to make separate determination as to:
  - (a) The question of the validity of the bad debt deduction claimed; and
  - (b) The year of loss.

Appellants have on file with the Internal Revenue Service a Claim for Refud, timely filed, claiming the said bad debt loss also in each of the years 1947 and 1948. If the loss is held to have occurred in either of said years the appellants would nevertheless be entitled to the deduction claimed in 1949 under the provisions of the Internal Revenue Code pertaining to "capital loss carryovers."

- (2) The failure to hold that California State law applies to the question of the determination of whether a debtor-creditor relationship resulted from the subject transaction.
- (3) The failure to hold that a debtor-creditor relationship resulted, under both State and Federal law, as a result of each of the following events:
  - (a) Failure to execute and file Certificate of Limited Partnership.
  - (b) Failure to obtain Permit from Division of Corporations to sell and issue interests in a limited partnership where no Certificate of Limited Partnership was filed.

- (c) Failure to obtain Permit from Division of Corporations to Sell and Issue interests in a mining venture.
  - (d) Fraud on the part of Jack Miller in failing to disclose that there were other partners and in failing to obtain permit to sell interests.
- (4) The sustaining of objection to admission into evidence of the filing of a Certificate under Uniform Limited Partnership Act of Miller Mining Co., in the office of Los Angeles County Clerk, by Jack Miller, on July 12, 1945.
  - (5) The failure to find with respect to the sale of an interest in the limited partnership, Miller Mining Co., by Jack Miller to Don Jones for fourteen thousand dollars (\$14,000.00) about January, 1946.
  - (6) The failure to determine that petitioner sustained a bad debt loss; and that the loss was deductible in the year 1949.
  - (7) The determination of a deficiency for the year 1949 in lieu of a determination that there was no income tax due from appellant for the year 1949.

## ARGUMENT.

### 1. Local Law or Federal Statute?

Primarily, the issue to be decided in this matter is whether the relationship of the taxpayers to Jack Miller was a debtor-creditor relationship. For that purpose, local law will govern, the question being one of property rights primarily and of income tax law only secondarily, there being no clear-cut federal rule or provision as to the determination of such a relationship. *Mertens Law of Federal Income Taxation* contains two sections relating to this subject as follows:

#### *Section 61.09.*

61.09—SUPREME COURT'S RULE OF DISTINCTION. While the federal courts have generally sought to respect the decisions of the state courts regarding rules of property in the interpretation of the income tax law, this has not been possible in every instance and a conflict has frequently resulted. The Supreme Court has attempted to resolve the conflict by establishing two rules, as follows:

(1) Where the question is the meaning of a federal statute, such as the revenue act, the will of Congress controls, and the federal statute is to be interpreted so as to give a "uniform application to a nationwide scheme of taxation," so that taxation may not be escaped through local decisions.

(2) Where the will of Congress depends upon a fact which can be interpreted only according to a state rule of property, as upon the question whether title has passed under state law, the state rule will govern.



*Section 61.13—Validity, Effect and Nature of Transactions. Local Restrictions and Prohibitions.*

Validity and effectiveness of transactions for federal tax purposes often turn upon local law. Here again the local law, or some local adjudication, cannot control if there is a clear-cut federal rule or provision as to how the transaction shall be treated.

Thus state law is not necessarily controlling as to what constitutes a "sale" as distinguished from a lease or exchange, the validity or effectiveness of a gift or, what constitutes "payment" of interest. On the other hand, local law may be considered in determining the quantum of evidence required to establish a gift between parent and child, whether there was such consideration for a transfer as to take it out of the gift category, existence of liability upon obligations entered into (to determine deductibility of claimed losses or uncollectibility).

In the case of *William Park*, 38 B. T. A. 1118, aff'd 113 F. 2d 352 (C. C. A. 3d, 1940), it was held that Pennsylvania law was controlling in upholding a note under seal, despite fact that the giving of consideration was not clearly shown.

In the *Sterling Morton* case, 38 B. T. A. 1270, aff'd 112 F. 2d 320 (C. C. A. 7th, 1940), it was held that Illinois law was controlling to determine whether there is an enforceable obligation in the case of interest due on a note executed on behalf of a syndicate by the syndicate manager pursuant to the authority granted him by the syndicate agreement.

In *Humphrey v. Comm.*, 91 F. 2d 155 (C. C. A. 9th, 1937), it was held that local law governs with respect to liability under a guaranty agreement, in determining whether payment of the same is a deductible loss.

In the *E. A. Roberts* case, 36 B. T. A. 549, it was held that local law governs in the determination of the liability of an endorser of a note for the purpose of establishing a bad debt.

## 2. Interest in Mining Lease—a “Security.”

The interest in the limited partnership which Jack Miller attempted to sell to the taxpayers was a “security,” on the basis and authority of code sections and cases immediately following, because it was “a certificate of interest in a mining title or lease.” The business to be engaged in, according to the agreements executed, was the mining business in the State of Arizona, Section 25008 of the Corporations Code defines a security as:

*Corporations Code, Section 25008. Security.*

“Security” includes all of the following:

(a) Any stock, including treasury stock; any certificate of interest or participation; any certificate of interest in a profit-sharing agreement; any certificate of interest in an oil, gas, or mining title or lease; any transferable share, investment contract, or beneficial interest in title to property, profits, or earnings.

(b) \* \* \*.

In *People v. Marr* (1941), 46 Cal. App. 2d 39, 115 P. 2d 214 (Dist. Ct. Ap.—4th Dist.), it was held that Corporate Securities Act, Section 2(a)(7) included certificates of interest other than those specifically mentioned, namely, certificates of interest in a profit-sharing agreement, and those in an oil, gas or mining title or lease. The statute includes as a security a certificate of interest or participation in a corporation or association.

In *People v. Dutton* (1941), 41 Cal. App. 2d 866, 107 P. 2d 937, defendant sold interests in the profits of a Shasta County mining venture through use of limited partnership agreements.

Trial court instructed jury that the instruments in question were securities under the law and a permit for their sale was required.

Appellate Court held that question of whether instruments were securities or not was one of law and not one of fact for jury to determine.

Other cases interpreting Corporations Code, Section 25008 are:

*Agnew v. Daugherty* (1922), 189 Cal. 446, 209 Pac. 34;

*Barnhill v. Young* (1931), 46 F. 2d 804;

*People v. Jackson* (1937), 24 Cal. App. 2d 182, 74 P. 2d 1085;

*Moore v. Stella* (1942), 52 Cal. App. 2d 766, 127 P. 2d 300, 51 A. C. A. 42, 124 P. 2d 167;

*People v. Sidwell* (1945), 27 Cal. 2d 121, 162 P. 2d 913, 65 A. C. A. 878, 151 P. 2d 145.

### 3. Limited Partnership Interest—a "Security."

The interest in the limited partnership which Jack Miller attempted to sell to the taxpayers was a "security" because it was an interest in a limited partnership and was not exempt as such because no certificate was ever executed, recorded or filed.

Section 25100 of the *Corporations Code of the State of California* relating to securities which are exempt under the Act provides:

“Except as otherwise expressly provided in this division, the Corporate Securities law does not apply to any of the following classes of securities:

(a) \* \* \*

(1) Any partnership interest in a general partnership, or in a limited partnership where certificates are executed, filed, and recorded as provided by Sections 15502 and 15525 of the Corporations Code of the State of California, except partnership interests when offered to the public.”

In *People v. Woodson* (1947), 78 Cal. App. 2d 132, 177 P. 2d 586, defendant sold interests to four or five people, in an alleged cattle ranch, through use and by means of limited partnership agreements, each party to share in the profits.

It was held that the issuance of partnership securities and limited partnership agreements without a permit are prohibited by Corporate Securities Act.

Certificates of limited partnership and certificates of interest in a profit-sharing agreement whereby the limited partner or a person holding an interest in a lease or agreement is to receive a percentage of the profits to be realized from the common venture, are “securities” within the meaning of the Corporate Securities Act.

In *People v. Hosher* (1949), 92 Cal. App. 2d 250, 200 P. 2d 882 (Dist. Ct. Ap., 2d D. Cal.), the defendant, by means of limited partnership agreement, sold interests in assets and profits of some seven juice bars. The court held that evidence that the promoter as a general partner sold interests in seven limited partnerships and as an individual sold certificates of interest in business of which he was sole proprietor, without having first ob-

tained permits to do so, sustained conviction of violating Corporate Securities Act.

Another case interpreting this code section is *People v. Simonsen* (1923), 64 Cal. App. 97, 220 Pac. 442.

#### 4. Partnership Interest Sold to Public—a “Security.”

The interest in the limited partnership which Jack Miller attempted to sell to the taxpayers was a “security” because it was a partnership interest sold to the public and was not exempt under the aforesaid Corporations Code, Section 25100.

The evidence in this case shows that interests in the limited partnership, Miller Mining Co., were sold to R. R. Crabtree, Dan Jones, and the taxpayers all at different times and places. There was no showing that there was ever a meeting of these parties or any discussions or conferences leading to a joint agreement to form a limited partnership.

No definition of the term “public offering” appears in either of the California statutes or the California Corporation Commissioner’s published rules and the California courts have had little to say on the subject. Two California cases are worthy of note:

*Mary Pickford Co. v. Bayly Bros., Inc.*, 12 Cal. 2d 501, 514 (1939), established that where persons are solicited at random, a public sale occurs even if the group solicited is small.

*Black v. Solano Co.*, 114 Cal. App. 170, 177-178 (1931), stands for the proposition that the character of the offering is the controlling factor; there may be a public offering even though the ultimate sale includes only a few persons and could be considered a private transaction.

5. Sale of Security—Void if No Permit.

The sale of the purported partnership interest, which was a "security" for the reasons above set forth, was void because Jack Miller had never obtained a permit for the sale of the same from the Division of Corporations of the State of California.

*Section 26100 of the Corporations Code of the State of California* covering issuance or sale of securities without permit or in non-conformity with permit provides:

"Every security of its own issue sold or issued by any company without a permit of the Commissioner then in effect authorizing the issuance or sale of the security is void. Every security of its own issue sold or issued by a company with the authorization of the commissioner but which has been sold or issued in non-conformity with any provision in the permit authorizing the issuance or sale of the security is void."

In *Randall v. Beber* (1951), 107 Cal. App. 2d 692, 237 P. 2d 994, it was held that a legislative intent to void a sale of corporate securities in non-conformity with the provisions of this act is inferable from the imposition of statutory penalties therefor.

In *Black v. Solano Co.* (1931), 114 Cal. App. 170, 299 Pac. 843, it was held that a sale without a permit of percentage of oil and gas to be produced was void even though the sale was private.

Other cases holding securities sold without a permit to be void are:

*First National Bank v. Thompson* (1931), 212 Cal. 388, 298 Pac. 808;

*El Clare Oil & Gas Co. v. Daugherty* (1930), 11 Cal. App. 2d 274, 53 P. 2d 1028, 55 P. 2d 488.

6. If Security Sale Void Seller Becomes Debtor of Buyer.

The law is well established that when a security, requiring a permit for its sale, has been sold without a permit having been issued, or in violation of the terms of a permit, the seller become indebted to the purchaser and the purchaser may recover the amount paid. For statement of the general rule, 87 A. L. R. 107, (b), *Recovery by Purchaser*, provides:

“The penalties of the Blue Sky Law are visited on the seller and not on the buyer, the statute being for the benefit and protection of the buyer, and if the buyer is not *in pari delicto* with the seller (and he is generally not so regarded), the general rule is that he may, within a reasonable time, recover his money, or property exchanged for stock, by tendering back the stock received by him.”

In *Garner v. Hogsett* (1948), 84 Cal. App. 2d 657, 191 P. 2d 497, it was held the amount paid for a security issued in violation of law may be recovered in an action for money had and received, without pleading a violation of the act.

In *Woods v. Deck* (1940), 112 F. 2d 739, it was held that certificates of interest in an oil venture, sold without a permit of the commissioner are void and purchasers thereof may recover the money paid in an action for money had and received or by an action for fraudulent misrepresentation as to the validity of the certificates or in an action for breach of implied warranty of validity.

In *Becker v. Stineman* (1931), 115 Cal. App. 740, 2 P. 2d 444, it was held that the stock issued in exchange for property was void. There was a failure of consideration entitling the person making the exchange to recover the property or its value.

In *Building Finance Ass'n Inc.* (1928), 26 F. 2d 123, (Dist. Ct., So. Dist. Calif.), it was held that claims against corporations of persons illegally purchasing stock must be considered in determining whether corporation was solvent within meaning of Bankruptcy Act.

Claims against corporation or shareholders who purchase stock with property instead of cash, in violation of permit given under Corporate Securities Act, must be considered as claims against corporation for money had and received in determining whether corporation was insolvent—notwithstanding the general rule that courts will not afford relief to parties *in pari delicto* \* \* \*.

Question was whether claims of stockholders were to be considered as liabilities of the corporation.

Other cases on recovery where securities sold without a permit are:

*Stallman v. Schwartz* (1946), 76 Cal. App. 2d 406, 173 P. 2d 388;

*Pollak v. Staunton* (1930), 210 Cal. 656, 293 Pac. 26;

*O'Connell v. Union Drilling & Petroleum Co.* (1932), 121 Cal. App. 302, 8 P. 2d 867;

*Barrett v. Gore* (1928), 88 Cal. App. 372, 263 Pac. 564.

## 7. No Certificate—No Limited Partnership.

The proposed limited partnership never came into being for another separate and distinct reason—there was no compliance with the California statute governing formation of limited partnerships. *Section 15502 of the Corporations Code of the State of California* dealing with the formation of limited partnerships provides:



“(1) Two or more persons desiring to form a limited partnership shall

“(a) Sign and swear to certificates in duplicate, which shall state \* \* \*

“(b) File one of said certificates in the clerk’s office and file the other for record in the office of the recorder of the county in which the principal place of business of the partnership is situated, and if the partnership has places of business situated in different counties, a copy of the certificate, certified by the recorder in whose office it is recorded, must be filed in the clerk’s office and recorded in like manner in the office of the recorder in each such county.

“(2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph (1).”

In order to have a limited partnership there must have been strict compliance with the Code. In this case, the parties failed to execute a certificate at all and there was, accordingly, no filing and no recording.

In *Churchill v. Peters, et al.* (Dist. Ct. App., 4th Dist.) (March, 1943), 57 Cal. App. 2d 521, 134 P. 2d 841, defendant had plaintiff sign document called “Original Articles to Certificate of Limited Partnership of the E. A. Peters Oil Company.” Certificate was not filed as required by Section 2478 of the Civil Code. Certificate was not sworn to. The court stated: \* \* \* no such limited partnership was “created or organized” under Section 2478 of the Civil Code, and that no general partnership, association or joint adventure was thus organized or created, but an involuntary trust resulted from the transaction.”

The Court also held: Where defendant not only sold certificates or interest in a purported limited partnership

and oil and gas lease without complying with Corporate Securities Act, but also obtained money for certificates by means of false representations, an "involuntary trust" was created in favor of the investors paramount to any alleged interest of defendant in lease or profits therefrom. (Civ. Code, Sec. 2224.)

In *People v. Hosher* (1949), 92 Cal. App. 2d 250, 206 P. 2d 882, it was held the issuance of a certificate of a limited partnership in a manner not authorized by former Civil Code, Sections 2478, 2501, was an act denounced by former Corporate Securities Act, Section 2a(7).

#### **8. General Partnership Does Not Result From Failure of Limited Partnership.**

When an attempt to organize a limited partnership fails and the proposed limited partnership does not come into existence, it does not follow that a general partnership results.

*Section 15511 of the Corporations Code of the State of California* dealing with persons erroneously believing themselves limited partners, provides:

"A person who has contributed to the capital of a business conducted by a person or a partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business or bound by the obligations of such person or partnership; provided, that on ascertaining the mistake he promptly renounces his interests in the profits of the business, or other compensation by way of income."

The Section in American Law Reports, 18 A. L. R. 2d 1360, dealing with this subject provides:

“Section 11 of the Uniform Limited Partnership Act applies so as to relieve all persons who erroneously believed that they became limited partners, either in a partnership organized under the old statutes, or in one organized under the Uniform Act.”

In *Rathke v. Griffith* (Wash., 1950), 218 P. 2d 757, it was held in part: Hence, one who joined a partnership as a limited co-partner is not liable as a general partner for partnership debts, even though, because of defects in the organization of the partnership, and, in particular, the failure to publish the certificate of partnership, he would have been so liable under the statutes in force at the time the partnership was organized, and even though the partnership never became a limited partnership under the Uniform Limited Partnership Act, which provides that a limited partnership formed prior to its adoption, unless it becomes a partnership under the Act, should continue to be governed by the provisions of the former statutes.

#### 9. Involuntary Trust—Fraud.

A debtor-creditor relationship arose between the taxpayers and Jack Miller on the ground of fraud.

*Section 2224 of the Civil Code of the State of California*, dealing with involuntary trusts resulting from fraud, mistake, etc., provides:

“One who gains a thing by fraud, accident, undue influence the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.”

The selling of securities itself, without a permit when a permit is required, may be sufficient fraud for recovery under the Civil Code Section.

In *Taormina v. Antelope Mining Corp.* (1952), 110 Cal. App. 2d 314, 242 P. 2d 665, it was held a seller of a security impliedly represents that a permit necessary for its valid sale has been secured, and such representation, if false, constitutes actionable fraud.

#### 10. "Debt" Defined.

The debtor-creditor relationship which resulted from the acts of the taxpayers and Jack Miller under the statutes and cases as set forth above, meets the requirements of a debt for federal income tax purposes.

In *Henry v. Burnet, Comm. of Int. Rev.* (1931), 8 B. T. A. 1089, Dec. 3000 aff'd (C. A. of D. C.), 48 F. 2d 459, it was held a debt may be defined as that which is due from one person to another, whether money, goods, or services; that which one person is bound to pay to another, or to perform for his benefit. It also has been defined to mean "every claim and demand upon which a judgment for a sum of money or directing payment of money, could be recovered in an action."

Wherefore, the appellants respectfully pray that this Court may determine and sustain their appeal.

NATHAN J. NEILSON,

*Attorney for Appellants.*

No. 14775

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**In the United States Court of Appeals  
for the Ninth Circuit**

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**ELMER J. THOMPSON AND HELEN H. THOMPSON,  
PETITIONERS**

*v.*

**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT**

---

**ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE  
TAX COURT OF THE UNITED STATES**

---

**BRIEF FOR THE RESPONDENT**

---

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**FILED**

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**In the United States Court of Appeals  
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No. 14775

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*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

---

*ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE  
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**BRIEF FOR THE RESPONDENT**

---

**OPINION BELOW**

The memorandum opinion of the Tax Court (R. 34-39) is not reported officially.

**JURISDICTION**

These petitions for review (R. 42-45, 45-A-45-D) involve federal income tax for the taxable year 1949. On November 17, 1952, the Commissioner mailed to the taxpayers notices of deficiency in the total amount of \$300. (R. 7-10, 28-32.) Within ninety days thereafter and on February 2, 1953, the taxpayers filed petitions with the Tax Court for a redetermination of those deficiencies under the provisions of Section 272 of the

Internal Revenue Code of 1939. (R. 1-20, 22-32.) The decisions of the Tax Court sustaining the deficiencies were entered on January 10, 1955. (R. 40, 41.) The case is brought to this Court by petitions for review filed April 7, 1955. (R. 42-45, 45-A-45-D.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

#### QUESTIONS PRESENTED

1. Did the taxpayers suffer a bad debt, within the meaning of Section 23(k)(4) of the Internal Revenue Code of 1939, as a result of their transaction with Jack Miller?

2. If the taxpayers suffered the alleged bad debt, *in what year did it occur?*

#### STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

#### SEC. 23. DEDUCTIONS FROM GROSS INCOME.

\* \* \* \* \*

(e) *Losses by Individuals*.—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; \* \* \*

(k) [As amended by Sec. 124(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 113(a) of

the Revenue Act of 1943, c. 63, 58 Stat. 21] *Bad Debts*.—

(1) *General rule*.—Debts which become worthless within the taxable year; \* \* \* and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction. This paragraph shall not apply \* \* \* with respect to a debt evidenced by a security as defined in paragraph (3) of this subsection. This paragraph shall not apply \* \* \* with respect to a non-business debt, as defined in paragraph (4) of this subsection.

\* \* \* \* \*

(3) *Definition of securities*.—As used in paragraphs (1), (2), and (4) of this subsection the term “securities” means bonds, debentures, notes or certificates, or other evidences of indebtedness, issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form.

(4) *Non-business debts*.—In the case of a taxpayer, other than a corporation, if a non-business debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months. The term “non-business debt” means a debt other than a debt evidenced by a security as defined in paragraph (3) and other than a debt the loss from the worthlessness of

which is incurred in the taxpayer's trade or business.

\* \* \* \* \*

(26 U.S.C. 1952 ed., Sec. 23.)

# SEC. 117. CAPITAL GAINS AND LOSSES.

\* \* \* \* \*

(e) [As amended by Sec. 150 (c) of the Revenue Act of 1952, *supra*] *Capital Loss Carry-Over*.—

(1) *Method of computation*.—If for any taxable year beginning after December 31, 1941, the taxpayer has a net capital loss, the amount thereof shall be a short-term capital loss in each of the five succeeding taxable years to the extent that such amount exceeds the total of any ~~act~~ capital gains of any taxable years intervening between the taxable year in which the net capital loss arose and such succeeding taxable year.

\* \* \*

\* \* \* \* \*

(26 U.S.C. 1952 ed., Sec. 117.)

# SEC. 322. REFUNDS AND CREDITS.

\* \* \* \* \*

(b) *Limitation on Allowance*.—

(1) *Period of limitation*.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall

be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

\* \* \* \* \*

(5) [As added by Sec. 169(a) of the Revenue Act of 1942, *supra*, and amended by Sec. 5(a) of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517] *Special period of limitation with respect to bad debts and worthless securities.*—If the claim for credit or refund relates to an overpayment on account of—

(A) the deductibility by the taxpayer, under section 23 (k) (1), section 23 k) (4), \* \* \*, of a debt as a debt which became worthless, \* \* \*, or

(B) the effect that the deductibility of a debt or loss described in subparagraph (A) has on the application to the taxpayer of a carry-over,

in lieu of the three-year period of limitation prescribed in paragraph (1), the period shall be 7 years from the date prescribed by law for filing the return for the year with respect to which the claim is made. \* \* \*

\* \* \* \* \*

(26 U.S.C. 1952 ed., Sec. 322.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.23(k)-1 [As amended by T. D. 5376, 1944 Cum. Bull. 119, 121]. *Bad debts*.— \* \* \*

\* \* \* \* \*

(b) If, from all the surrounding and attending circumstances, the Commissioner is satisfied that a debt is partially worthless, the amount which has become worthless, to the extent charged off during the taxable year, shall be allowed as a deduction in computing net income. \* \* \*

Where the surrounding circumstances indicate that a debt is worthless and uncollectible and that legal action to enforce payment would in all probability not result in the satisfaction of execution on a judgment, a showing of these facts will be sufficient evidence of the worthlessness of the debt for the purpose of deduction. Bankruptcy is generally an indication of the worthlessness of at least a part of an unsecured and unpreferred debt. \* \* \*

\* \* \* \* \*

(d) The provisions of subsections (a) and (b) of this section apply to all taxpayers, except that (1) they do not apply in the case of a taxpayer, other than a corporation, with respect to a non-business debt as defined in paragraph (4) of section 23(k) of the Code; (2) no deduction on account of worthlessness shall be allowed with respect to any debt of the type enumerated in section 23(k)(5) of the Code which is recoverable

only in part; and (3) in the case of taxpayers other than banks as defined in section 104, the term “debts” as used in such subdivisions means obligations to pay fixed or determinable sums of money which are not evidenced by securities as defined in section 29.23(k)-4.

SEC. 29.23(k)-6. *Non-Business Bad Debts.*—In the case of a taxpayer, other than a corporation, if a non-business bad debt becomes entirely worthless within a taxable year beginning after December 31, 1942, the loss resulting therefrom shall be treated as a loss from the sale or exchange of a capital asset held for not more than six months. Such a loss is subject to the limitations provided in section 117 with respect to gains and losses from the sale and exchange of capital assets. A loss with respect to such a debt will be treated as sustained only if and when the debt has become totally worthless, and no deduction shall be allowed for a non-business debt which is recoverable in part during the taxable year. Nor are the provisions of this subdivision applicable in the case of a loss resulting from a security as defined in section 23(k)(3). A non-business debt is a debt, other than a debt the loss from the worthlessness of which is incurred in the taxpayer’s trade or business and other than a debt evidenced by a security as that term is defined in section 23(k)(3). \* \* \*

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## STATEMENT

The following, substantially as contained in the Tax Court's memorandum opinion (R. 34-39), are the facts found by the court below upon the basis of the stipulation of facts (R. 34, 46-47) and (R. 35-37) from the testimony adduced at the hearing:

On or about July 10, 1945, Elmer J. Thompson, taxpayer herein, purported to enter into a limited partnership agreement with Jack Miller, to be known by the name "Miller Mining Company", for the purpose of engaging in a mining business in Arizona, by signing a purported limited partnership agreement, such agreement providing that the taxpayers were to receive a one-eighth interest in and to all of the profits of the partnership. On or about December 12, 1945, Thompson purported to acquire an additional one-eighth interest in the limited partnership by signing another written agreement. Thompson advanced to Jack Miller, in reliance upon and in accordance with the provisions of the purported limited partnership agreement, the total sum of \$14,700 (R. 34), on the dates and in the amounts set forth below (R. 35):

Date of Check	Type of Check	Amount of Check
February 6, 1945	Taxpayer's Personal	\$1,500.00
August 6, 1945	Taxpayer's Personal	1,000.00
August 13, 1945	Taxpayer's Personal	1,500.00
October 29, 1945	Taxpayer's Personal	2,500.00
December 14, 1945	Bank Cashier's Check	6,000.00
March 7, 1946	Bank Cashier's Check	1,500.00
April 6, 1946	Bank Cashier's Check	700.00
Total		<hr/> \$14,700.00

No certificate of limited partnership for the purported limited partnership was ever executed by the



taxpayers, and none was filed with the Clerk of Los Angeles County. (R. 35.) No permit authorizing the sale and issuance of securities was ever issued by the Department of Investment, Division of Corporations, State of California, to Jack Miller and/or Miller Mining Company to and including May 21, 1954. (R. 36.)

In the summer of 1946, Thompson made a trip to Kingman, Arizona. Miller conducted him through two mines which he represented to him were their mining property and in these mines men were working, mining equipment was in evidence and actual mining of gold operations was being carried on. Thompson has never visited the mining site since. He never took any steps to verify Miller's title to the property. (R. 36-37.)

Thompson received no financial reports of any kind from the operations of the mining venture or copies of any partnership tax returns. He did receive a written report or reports that there were some sales of ore by Jack Miller to the Kennecott Copper Company. The only other reports Thompson received were verbal assurances from Miller that the project was going well and that the profits were foreseeable. The taxpayers were furnished information in 1947 by Jack Miller with respect to three allegedly then existing mines. (R. 35-36.)

Thompson does not know whether the mine is still operating. He never received any return of money from Miller nor any funds representing profits from the mining venture. He does not know whether or not his funds were ever in fact invested in the mining venture. His last contact with Jack Miller was some time near the middle of the year 1947. (R. 36-37.)

On the above facts, each taxpayer asked approval of

a deduction of a bad debt in the amount of \$1,000 for the year 1949. (R. 37.) The Commissioner disallowed the deductions and the Tax Court sustained his determinations. (R. 38.)

#### SUMMARY OF ARGUMENT

I. The record fails to support the taxpayers' claim that a "debt" was ever created or existed between themselves and Miller in the sense that that term is used in Section 23(k) of the Internal Revenue Code of 1939 which grants a deduction for "Bad Debts". The taxpayers admit that the advances were made under purported partnership agreements under which they obtained a one-fourth interest in a mining venture which proved unsuccessful. Their contention that this interest was transmuted into a debt because of failure to comply with state law is without merit. At best, their argument is that because of failure to file a certificate of limited partnership a right of action against Miller resulted. This, we submit, is no transmuted debt under the federal statute. But, further, there is no showing that any right of action accrued against Miller for the moneys paid for the one-fourth interest, merely because of failure to file the certificate. There is no showing of fraud, or damage because thereof. There is no showing that the funds were not used for the purposes intended, and no showing that the taxpayers would not have enjoyed their full one-fourth share of any profits had there been profits.

II. Furthermore, the taxpayers have not even attempted to answer the question—"If they suffered a 'bad debt', in what year did it actually become worthless?" They have not answered this question because they cannot. They bore the burden of proof, and there

is no proof, either that the alleged debt had any value at the beginning of the taxable year or that it actually became worthless in any particular year prior to 1949.

#### ARGUMENT

The "loss" and "bad debt" provisions of the Internal Revenue Code of 1939 are mutually exclusive. *Spring City Co. v. Commissioner*, 292 U.S. 182; *Inman-Poulsen Lumber Co. v. Commissioner*, 219 F. 2d 159, 162 (C.A. 9th). The taxpayers do not claim the deduction as a loss in 1949, which would require a showing that their investment became worthless in 1949. Section 23(e) of the 1939 Code, *supra*. In fact they admitted in the Tax Court that the item "probably became bad sometime near the middle of the year 1947". (R. 37-38.)

On the contrary, the taxpayers pitched their case on the grounds that the item involved was a non-business bad debt. In so doing they made no attempt to prove the particular year in which the asserted bad debt became worthless. It is true that if they had established that the item was a non-business bad debt *and* that such debt became worthless in a particular year, they would have been entitled to carry a short-term capital loss forward to each of five succeeding years to be applied against net capital gains by virtue of Sections 23(k)(4) and 117(e)(1) of the 1939 Code, *supra*.

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However, we submit that the mere fact that such a "loss" may be spread over a five-year period would not relieve the taxpayers of their burden of proving the particular year in which it occurred.

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## I

**There Was Never Any "Debt" Created or Existing Between  
the Taxpayers and Miller**

*A. There was no debt within the purview of Section  
23(k) of the Internal Revenue Code of 1939*

To overcome the Commissioner's determination, the taxpayers first had to prove that their association with Miller was not that of limited partner, or outfitter, or grubstaker in a mining venture for profit, but was, instead, that of creditor in a personal loan transaction, detached from and without interest in the mining venture. Section 23(k)(4), 1939 Code.

However, the taxpayers admitted in their petitions in the Tax Court that they "purported to enter into a limited partnership agreement with Jack Miller, for the purpose of engaging in the mining business in Arizona"; and that they "advanced money to the said Jack Miller", "Acting upon the belief that a valid limited partnership had been entered into". (R. 2, 3, 23, 24; Ex. B, C, R. 11, 16.) They do not now deny that this was their subjective intent.<sup>1</sup> There is no showing that if the venture had been successful the taxpayers would have been entitled to less than one-fourth of the profits therefrom. There is no showing that the tax-

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<sup>1</sup> At no time during the proceedings below was there any claim of fraud or a shred of evidence directed toward such proposition. There is not the slightest intimation in Judge Van Fossan's opinion that this could have been the case. Certainly there can be no merit or validity in the taxpayers' coming in at this late stage in the proceedings and merely reciting that there "may be sufficient fraud" for recovery under California law. (Br. 20.) *Inman-Poulsen Lumber Co. v. Commissioner*, 219 F. 2d 159, 162 (C.A. 9th). In any event, there is no showing that the taxpayers acquired even a right of action against Miller.

payers were entitled to recover their investment merely because the venture proved unsuccessful.

A debt, and accordingly the right to deduct its worthlessness, for federal tax purposes, is a transaction between parties intending to create *ab initio* a loan or credit situation—i.e., debtor-creditor relationship in the ordinary sense—and rests upon the existence of an unconditional obligation or guarantee to repay the amount of the money advanced or credit extended. *Inman-Poulsen Lumber Co. v. Commissioner*, 219 F. 2d 159, 161 (C.A. 9th); *Kanne v. American Factors*, 190 F. 2d 155 (C.A. 9th); *Alexander & Baldwin v. Kanne*, 190 F. 2d 153 (C.A. 9th); *San Joaquin Brick Co. v. Commissioner*, 130 F. 2d 220 (C.A. 9th); *Earle v. W. J. Jones & Son*, 200 F. 2d 846 (C.A. 9th); *Russell Box Co. v. Commissioner*, 208 F. 2d 452 (C.A. 1st); *Bercaw v. Commissioner*, 165 F. 2d 521 (C.A. 4th); *Allen-Bradley Co. v. Commissioner*, 112 F. 2d 333 (C.A. 7th); *Commissioner v. O. P. P. Holding Corp.*, 76 F. 2d 11 (C.A. 2d); *Milton Bradley Co. v. United States*, 146 F. 2d 541 (C.A. 1st); *Spreckels v. Commissioner*, decided January 25, 1946 (1946 P-H T.C. Memorandum Decisions, par. 46,025). The taxpayers' argument is not that they intended to establish a debtor-creditor relationship *ab initio* by virtue of their purported limited partnership agreement or joint venture in the mining business, but rather that such joint venture, or grubstake, or limited partnership arrangement somehow "became that of debtor and creditor". (R. 4, 25.)

The taxpayers' argument is based upon a misconception of the term "debt" as it is obviously intended to be used in the statute. The definition (Br. 20) upon which they rely is not a judicial one. It was culled out

of context from the opinion of the Board of Tax Appeals in *Henry v. Commissioner*, 8 B.T.A. 1089, 1097, wherein the Board itself did not apply such a broad definition in deciding the case. Instead the Board, having to distinguish between a "loss" and a "debt" because of seeming inconsistencies in the taxpayer's pleadings (p. 1097), in fact utilized the same definition of "debt" which we have shown above to be the one applicable for federal tax purposes. The Board made it clear that only existing obligations in the nature of contracts enforceable in actions *at law* come within the definition and not "*every claim*" upon which a judgment for a sum of money could be recovered in "*an[y] action.*" (Italics supplied.) The Board went on to say (pp. 1097-1098):

It is a general rule of law that so long as a partnership continues one partner can not maintain an action *at law* against the firm or against a copartner on account of matter connected with the partnership \* \* \*.

The appellate court affirmed the Board's decision. *Henry v. Burnet*, 48 F. 2d 459 (C.A.D.C.).

The California cases cited by the taxpayers, as well as their citation from the American Law Reports (Br. 15-16), are bound up with *fraud* and the *trust-fund* theory of recovery against California blue-sky law violators.<sup>2</sup> Actionable fraud sounds in tort for wrong-

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<sup>2</sup> We wish to note at this point that there is no justification in fact or in law for the contention (Br. 10-16) that the written agreements entered into between the taxpayers and Miller (R. 11, 16) were illegal security transactions within the intendment of the California "blue-sky" law. *People v. Woodson*, 78 Cal. App. 2d 132, 177 P. 2d 586, cited by the taxpayers (Br. 12), gives us a good idea of what the California courts actually hold to be the

ful conversion of property, not in contract for debt. *Graner v. Hogsett*, 84 Cal. App. 2d 657, 191 P. 2d 497; *Woods v. Deck*, 112 F. 2d 739 (C.A. 9th); and *Becker v. Stineman*, 115 Cal. App. 740, 2 P. 2d 444, cited by the taxpayers (Br. 15), all involve the *fraudulent* sale of securities.<sup>3</sup> *In re Builders' Finance Ass'n*, 26 F. 2d

issuance of "partnership securities", and how far removed such a situation is from the present case. In that case, in each of the four separate violations involved, there was the *fraudulent* issuance of *personal promissory* notes as *collateral for repayment* along with the certificate of limited partnership, in reliance upon which personal guarantees the investment was consummated. In the instant case, as we have noted, there was never any claim of fraud before the court below, and there was no such personal obligation assumed by Miller. The written agreements between the taxpayers and Miller do not even fall within the statutory definition of a "security". (Pet. Br. 10.) The cases decided under Section 25008 of Deering's California Corporations Code Annotated Title 4, c. 1 (Pet. Br. 10-11) do not have any bearing, even for the sake of argument, upon the decision of this case. There is no such "certificate of interest in a \* \* \* mining title or lease" involved herein. The arrangement, although limited in certain aspects, was a joint venture for the purpose of "engaging in the mining business". (R. 16.) The taxpayers did not even know how many claims Miller had or could work. (Tr. 34.) The arrangement was never limited to any specific title or lease. Furthermore, this particular arrangement is expressly excepted in Section 25100 of Deering's California Corporations Code Annotated, Title 4, c. 2, Article 1 (Pet. Br. 11-12) from coverage under the blue-sky laws. They do not apply to "Any partnership interest \* \* \* in a limited partnership where certificates are executed, filed, and recorded \* \* \* except partnership interests when offered to the public." We will show hereinafter that, consistent with California statute and case law, Miller's failure to file a formal certificate does not have any bearing upon this case. Also, there was no public offering.

<sup>3</sup> We should also note that if the taxpayers ever successfully recovered a judgment based upon actionable fraud, making themselves whole, the proceeds would likely not even constitute taxable income, whereas any future bad-debt recovery would. See *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, rehearing denied, 349 U.S. 925; *Commissioner v. William Goldman Theatres, Inc.*, 348 U.S. 426, rehearing denied, 349 U.S. 925; *Gen. Investors Co. v. Commissioner*, 348 U.S. 434.

123 (S.D. Cal.), cited by the taxpayers (Br. 16), is even further afield—involving the question of how little assets a corporation had, not how great was its liability to persons who illegally purchased stock. Since there was no duty upon Miller to repay the taxpayers the sum of money invested, or, for that matter, any sum at all, an action of “debt” would not lie in this case. *Raborg v. Peyton*, 2 Wheat. 385; cf. *Henry v. Commissioner*, 8 B.T.A. 1089, affirmed, 48 F. 2d 459 (C.A.D.C.); *Miller v. Robertson*, 266 U. S. 243, 249-250.

Thus, the taxpayers have failed to establish a bad debt deduction. Where the clear intendment of the taxpayers was to make an investment for profit, they will not be heard to claim they merely made a loan. *Root v. Commissioner*, 220 F. 2d 240 (C. A. 9th).

#### *B. There was no debtor-creditor relationship under California law*

It is axiomatic that the validity of a bad debt deduction for purposes of federal income taxation is a federal question. This Court has decided such questions any number of times. *Inman-Poulsen Lumber Co. v. Commissioner*, 219 F. 2d 159; *Elko Lamoille Power Co. v. Commissioner*, 50 F. 2d 595; *San Joaquin Brick Co. v. Commissioner*, 130 F. 2d 220; *Earle v. W. J. Jones & Son*, 200 F. 2d 846; *Root v. Commissioner*, 220 F. 2d 240. See, also, H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 44-45, 76 (1942-2 Cum. Bull. 372, 408-409, 431); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 89-90 (1942-2 Cum. Bull. 504, 572-573). Although the California statutes and the decisions of California state courts would not control this Court's decision of the questions here



involved, we have, nevertheless, examined the California cases and statutes and find nothing to contradict the decision below that the taxpayers failed to establish the existence of a personal debtor-creditor relationship with Miller.

The grubstake, or outfitting, or limited partner relationship between parties in a gold mining venture is a familiar one to the California courts. See 17 Cal. Jur., Sec. 115, p. 453. It is firmly established in their decisions that no debtor-creditor relationship is created, but rather a venture for profit. *Berry v. Woodburn*, 107 Cal. 504, 40 Pac. 802; *Moritz v. Lavelle*, 77 Cal. 10, 18 Pac. 803; *Gore v. McBrayer*, 18 Cal. 582; *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689.

Similarly, the express language of provisions of Deering's California Corporations Code, Title 2, Chapters 1<sup>4</sup> and 2,<sup>5</sup> support the Tax Court's conclusion in

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## ARTICLE 2

### *Nature of Partnership.*

Sec. 15006. *Partnership defined.* (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(2) \* \* \* this Act shall apply to limited, special, and mining partnerships except insofar as the statutes relating to such partnerships are inconsistent herewith.

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## ARTICLE 4

### *Relations of Partners to One Another.*

Sec. 15018. *Rules determining rights and duties of partners.* The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(a) Each partner shall be repaid his contributions \* \* \*.

(b) The partnership must indemnify every partner in respect of payments made \* \* \* by him in the ordinary and

this case that no personal debtor-creditor relationship was created between the taxpayers and Miller. There is no personal debtor-creditor relationship between partners as regards their respective investments. Nor can a partner expect any exact amount—*viz.*, the specific sum invested—to be repaid. He can only look to a distribution of his aliquot share of the partnership assets. His interest is measured in terms of a percentage, not in fixed dollars and cents. See, also, *Gleason v. White*, 34 Cal. 258, for a judicial affirmation of these principles.

The law is clear—under Section 15502(b) (2) of Deering's California Corporations Code, Title 2, c. 2—that to establish a limited partnership *de jure* "substantial compliance" with the statute is necessary. *Russell v. Warner*, 96 Cal. App. 2d 986, 988, 217 P. 2d 43, 44. But the law is equally clear that insofar as the relations of would-be partners *inter se* are concerned, no partner can resort to a failure to substantially comply with the formal statutory requisites in order to rid himself of his obligations to the other partner or to third parties where the partnership has been established *de facto*. *Siebold v. Berdine*, 61 Cal. App. 158, 214 Pac. 655; *Russell v. Warner, supra*. The facts in this case would

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proper conduct of its business, and for the preservation of its business or property.

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## ARTICLE 5

### *Property Rights of a Partner.*

Sec. 15024. *Extent of property rights of a partner.* The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management.

<sup>5</sup> There are no provisions in Title 2, Chapter 2, Uniform Limited Partnership Act, inconsistent with the substantive provisions set forth in fn. 4, *supra*, relating to partnerships in general.

easily lend themselves to the conclusion, by the California courts, that a *de facto* partnership relation was established between the taxpayers and Miller. *Kaufman-Brown Potato Co. v. Long*, 182 F. 2d 594, 599 (C. A. 9th); *Stowe v. Merrilees*, 6 Cal. App. 2d 217, 44 P. 2d 368; *Niroad v. Farnell*, 11 Cal. App. 767, 106 Pac. 252; *Cal. Emp. Etc. Com. v. Walters*, 64 Cal. App. 2d 554, 149 P. 2d 17; *Westcott v. Gilman*, 170 Cal. 562, 150 Pac. 777; *Denning v. Taber*, 70 Cal. App. 2d 253, 160 P. 2d 900; *Kersch v. Taber*, 67 Cal. App. 2d 499, 154 P. 2d 934. Moreover, there was nothing to prevent the taxpayers themselves from filing the certificate of partnership. They have not shown that they were harmed by the filing defect. Besides, the filing requirement is no doubt directed toward the protection of subsequent parties. There is also no indication that any third party suffered. There is no showing that the moneys invested were not used for the purposes intended; and the venture proved unsuccessful.

## II

**Even If It Could be Held that a Debtor-Creditor Relationship Existed, There Is No Showing that it Became Worthless in 1949, Nor Any Showing of Any Particular Year in Which it Became Worthless**

The taxpayers pose the question (Br. 5) “\* \* \* in what year did the [bad debt] loss occur?”, but do not attempt to answer it. They cannot answer it because there is no proof either that the debt had any value at the beginning of the taxable year or that it actually became worthless in a particular year prior to 1949, although they admit that it could have become entirely worthless in *some* prior year. (R. 37-38.) The burden was upon the taxpayers to establish this second vital

aspect of their case, and their failure to do so is fatal. *Lauriston Inv. Co. v. Commissioner*, 89 F. 2d 327 (C. A. 9th); *San Joaquin Brick Co. v. Commissioner*, 130 F. 2d 220 (C. A. 9th); *Capital Service, Inc. v. Commissioner*, 180 F. 2d 579 (C. A. 9th); *Henry v. Burnet*, 48 F. 2d 459 (C. A. D. C.); *Kentucky Rock Asphalt Co. v. Helburn*, 108 F. 2d 779 (C. A. 6th); *Cittadini v. Commissioner*, 139 F. 2d 29 (C. A. 4th); *Redman v. Commissioner*, 155 F. 2d 319 (C. A. 1st); *Rockefeller v. Nunan*, 142 F. 2d 354 (C. A. 2d), certiorari denied, 323 U. S. 732; H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 44-45, 76 (1942-2 Cum. Bull. 372, 408-409, 431); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 89-90 (1942-2 Cum. Bull. 504, 572-573).

#### CONCLUSION

The Tax Court's decisions are correct and should be affirmed.

Respectfully submitted,

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NOVEMBER, 1955.

No. 14775

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ELMER J. THOMPSON, HELEN H. THOMPSON,

*Appellants,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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## APPELLANTS' REPLY BRIEF.

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**FILED**

**NOV 23 1955**

PAUL P. O'BRIEN, CLERK



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## APPELLANTS' REPLY BRIEF.

---

### Summary of Respondent's Contentions.

The Respondents contentions in opposition to Appellant's position, as set forth in Respondent's Brief, appear to fall within three general categories:

1. Federal Law governs in determination of bad debt deduction.
2. Appellant must prove absence of any relationship other than debtor-creditor.
3. Failure of Appellant to prove year of loss.

## Federal Law Governs in Determination of Bad Debt Deduction.

Throughout the entire tax controversy herein involved, prior to, during trial, and subsequent thereto, Respondent has contended that Federal Law governed the allowance of "bad debt deductions." It is obvious from Respondent's contentions throughout that he meant to imply that Federal Law Government not only "the deduction of a bad debt" but the determination of whether a "debtor-creditor" relationship existed, and whether a debt became "bad." Further the apparent intention of Respondent in taking this position was to imply that Federal Law in this respect was different than State Law.

It is conceded that the claiming of a bad debt "deduction" is governed by the law which Respondent set forth in his Brief. (Resp. Br. pp. 2-7.) Respondent has not, however, supplied any authority to refute Appellant's contention that State Law governs in the determination of a debtor-creditor relationship.

For the first time in the entire proceedings, Respondent in his Brief sets forth his authority for his position. (Resp. Br. p. 13.) He starts by setting forth what he contends to be the general rule: "A debt, and accordingly the right to deduct its worthlessness, for federal tax purposes, is a transaction between parties intending to create *ab initio* a loan or credit situation—i.e., debtor-creditor relationship in the ordinary sense—and rests upon the existence of an unconditional obligation or guarantee to repay the amount of the money advanced or credit extended." In support of this alleged rule he cites some ten Federal Court cases. Nowhere in these cases is there found any holding to support the rule as set forth

by the Respondent. The only general rule to be found in these cases is that set forth in *Inman-Poulsen Lumber Co. v. Commissioner*, 219 F. 2d 159, where the Court said, "The term 'indebtedness' as used in the act implies an unconditional obligation to pay."

Further examination of these cases reveal that they are of no help in this matter because they are based on factual situations not analogous to the instant case. In the *Inman-Poulsen Lumber Co.* case, the advances which were made as the basis for the bad debt claim were advances to a shareholder to be repaid only if, as, and when dividends were paid by the corporation. The Court held the advances were in the nature of gifts rather than bona fide debts.

In the cases of *Kanne v. American Factors*, 190 F. 2d 155, and *Alexander & Baldwin v. Kanne*, 190 F. 2d 153, the notes involved were payable only when, if and to the extent that after all the indebtedness and litigation costs of Waterhouse had been discharged, it still had assets from the sale of which all or part of the sum could be paid. These conditions were never met and the Court stated there was no certainty that they ever would be. The Court did state however:

"If thereafter the Waterhouse Co. had become hopelessly insolvent and could not possibly have paid anything on the debt, it would have become 'bad' within the meaning of Section 23(j). That was not the case."

In *San Joaquin Brick Co. v. Commissioner*, 130 F. 2d 220, the bad debt claimed involved a loss on bonds.

In *Earle v. W. J. Jones & Son*, 200 F. 2d 846, the question was whether advances by shareholders were loans

or capital contributions. The Lower Court found they were loans. Judgment was affirmed.

In *Russell Box Co. v. Commissioner*, 208 F. 2d 452, the primary question was one of sufficiency of evidence only.

In *Bercaw v. Commissioner*, 165 F. 2d 521, the question of the bad debt pertained to the guardian's duty to repay the money in the event of a successful termination of the litigation; and that event never took place.

In *Milton Bradley Co. v. United States*, 146 F. 2d 541, the Court held that under the Statute an amount is deductible for income tax purposes as a "bad debt" where there is a valid debt arising out of a debtor-creditor relationship, and an unconditional obligation to pay. The liability to pay in the future, contingent upon something which may or may not occur, is not an indebtedness.

In *Allen-Bradley Co. v. Commissioner*, 112 F. 2d 333, the Court held that "an indebtedness" signifies an unconditional obligation to pay.

Nowhere in the foregoing is there authority for Respondent's position that a debtor-creditor relationship must be "intended" at the commencement of a transaction and not a "result" therefrom. Nowhere in the foregoing is there any support for Respondent's contention that Federal Law governs in the determination of debtor-creditor relationship.

Further, Respondent has made no showing that even if Federal Law controls in such a situation, that a debtor-creditor relationship did not arise in the instant case.

## Appellant Must Prove Absence of Any Relationship Other Than Debtor-Creditor.

Respondent in his Brief states, "To overcome the Commissioner's determination, the taxpayers first had to prove that their association with Miller was not that of limited partner, or outfitter, or grubstaker in a mining venture for profit, but was, instead, that of creditor in a personal loan transaction, detached from and without interest in the mining venture. Section 23(k)(4), 1939 Code." (Resp. Br. p. 12.) He states further "The taxpayers' argument is not that they intended to establish a debtor-creditor relationship *ab initio* by virtue of their purported limited partnership agreement or joint venture in the mining business, but rather than such joint venture, or grubstake, or limited partnership arrangement somehow 'became that of debtor and creditor.'" (Resp. Br. p. 13.) And further, "Thus, the taxpayers have failed to establish a bad debt deduction. Where the clear intendment of the taxpayers was to make an investment for profit, they will not be heard to claim they merely made a loan." (Resp. Br. p. 16.)

In the instant transaction the Appellants advanced the sums involved to the said Jack Miller. No part of the money was ever recovered by the Appellants. For income tax purposes the Appellants, upon the advice of counsel, and after careful consideration, determined that they had suffered a non-business bad debt loss. They claimed this loss on their 1940 income tax return. It is axiomatic that the only thing the Appellants were required to substantiate in the Tax Court was this bad debt deduction. It makes no difference how many or what kind of relationships existed between the Appellants and the said Jack Miller.

## Failure of Appellant to Prove Year of Loss.

The Appellants, in their own minds, in the year 1949 concluded, and this for the first time, that they would never recover any of the money advanced to the said Jack Miller. They claimed their bad debt loss in that year.

Much was made by the Tax Court and by Respondent in his Brief of the statement by Appellants that the debt "probably became bad sometime near the middle of the year 1947." (Resp. Br. p. 11.)

He fails apparently to distinguish between actual date of worthlessness and the date of ascertainment of that fact by the Appellants.

In *San Joaquin Brick Co. v. Commissioner*, 130 F. 2d 220, cited by Respondent, the Court held:

"In the case of bad debts, the actual worthlessness of the debt prior to the tax year in which the deduction is claimed is immaterial so long as the debt 'is not ascertained to be worthless' by taxpayer prior to that time.

"Nobody understands that this imposes upon him the absolute risk of selecting the year they actually became so."

There were two separate grounds upon which the Tax Court, had it determined that Appellants had suffered a bad debt loss, could have found the loss allowable in the year 1949:

1. Upon the ground that that was the year in which the Appellants ascertained they sustained the loss and the year in which they claimed it.
2. As a carryover either from the year 1947 or the year 1948.

Even though the “debt” from Jack Miller to the Appellants came into being at the time of the initial transactions, the Appellants could not have claimed and could not have substantiated that it became “bad” in any year prior to 1947. Appellant has on file valid and timely claims for refund, filed under seven-year Statute of Limitations, claiming the bad debt loss in each of the years 1947 and 1948. Carryover provisions are set forth in both Appellant’s and Respondent’s Briefs.

The Tax Court has a moral and a legal duty to assist in the proper determination of Appellant’s income taxes. The decision of the Tax Court that the Appellants did not suffer a bad debt loss in the year 1949 is of no assistance whatsoever either to Appellants or Respondent as far as a determination of the validity of the aforesaid 1947 and 1948 claims are concerned. It leaves the parties no alternative but to commence proceedings all over again.

The Tax Court had before it every fact, upon which to determine the year of loss, that was available to Appellants.

November 22, 1955.

Respectfully submitted,

NATHAN J. NEILSON,

*Attorney for Appellants.*





No. 14,776

United States Court of Appeals  
For the Ninth Circuit

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C. A. CHAPMAN,

VS.

JOHN O. ENGLAND, et al.,

*Appellant,*

*Appellees.*

BRIEF FOR APPELLEE.

---

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**United States Court of Appeals  
For the Ninth Circuit**

---

C. A. CHAPMAN,	} <i>Appellant,</i>
VS.	
JOHN O. ENGLAND, et al.,	
	} <i>Appellees.</i>

---

**BRIEF FOR APPELLEE.**

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**STATEMENT OF FACTS.**

There appears to be no conflict with regard to the applicable facts, and the Statement of Facts as set forth in Appellant's Opening Brief, pages 1 through 3, will be accepted by Appellee.

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**ARGUMENT.**

**I.**

**THE QUESTION OF INSURANCE CONTRACT.**

Appellee agrees with the Appellant's position that this is a case involving contract and insurance law, but as Appellant apparently overlooked, it also involves the laws of creditors' rights and/or bank-

ruptcy, and it is Appellee's contention that the Appellant, C. A. Chapman, did not have an insurable interest in the lumber mill or any portion thereof.

**A. Appellant is entitled to nothing from the insurance proceeds for the Log Boss which was destroyed by fire.**

Appellee disagrees with Appellant's position with regard to this subject as set forth in his Opening Brief on pages 4 and 5 since Appellant was not the owner of the Log Boss, nor was the Log Boss of the agreed value of \$4,000.00.

As to the title to the Log Boss, Appellee contends that a sale pursuant to a conditional sales contract transfers the title to the purchaser while keeping a security title only in the seller until the terms of the contract have been completely complied with, and Appellee directs the Court's attention to the case of *Abrahams v. Hammel*, 40 Cal. App. 11, where it was held that the sale and purported transfer from the original vendee under a conditional sales contract to a third party, who did not take the property into his possession was, as to an attaching creditor of such original vendee, deemed fraudulent and void.

That there was no change of possession as to the Log Boss has been freely conceded by Appellant, and it is Appellee's contention that there can be no sufficient change of possession when the property appears to remain, to all external appearances, at the same place and in the same condition in which it was before the sale, and there is nothing to notify purported third persons of the claim of the new owner.

See *Bunting v. Salz*, 84 Cal. 168. *The possession of the vendee must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee.* Constructive possession by the vendee of personal property sold, or the mere transfer of ownership of land on which the personal property is situated, is not alone sufficient to constitute the change of possession of the personal property required by the Statute of Frauds; *but the possession of the personal property must be so changed as to indicate by the change that the former owner no longer owns it.* In the case of *Cosby v. Cline*, 186 Cal. 698, the property in question was under attachment and was sold while under attachment and it was held that the actual transfer of possession *could not* take place until the attachment had been released. In *Gray v. Corey*, 48 Cal. 208, the Court held that where an owner of horses had rented them out with their drivers to work for another person, and the horses were kept in such person's barn, and the owner thereafter sold the horses to such person, the horses being kept in the same place and the same drivers being employed, there was not sufficient change of possession to take the sale out of the statute.

In *Sequeira v. Collins*, 153 Cal. 426, the property in question was 640,000 bricks and the Court held, quoting *McKee Store Co. v. Martin*, 126 Cal. 557, that:

“There must be a visible and apparent change of the custody of the property, such as to give evidence to the world of the claims of the new owner.”

Then the Court, at page 432, said:

“That it has never been held, at least in this state, that an actual change of possession has taken place where the transferer, after the transfer, continues to exercise the same control and dominion over the property as before and has done nothing to indicate any intention of passing that control and dominion from himself to his transferee.”

The Court also cited *Wood v. Bugbey*, 29 Cal. 467, and *Lay v. Neville*, 25 Cal. 552, in support of this rule of law. See also *Guthrie v. Carney*, 19 Cal. App. 144, wherein the Court held that transfer of a stock of wines and liquors in barrels, demijohns and bottles was violative of Section 3440 of the Civil Code of the State of California in that delivery of the key to the barn in which this stock of wines and liquors was stored at the time of the execution and recording of the bill of sale did not of itself constitute an actual delivery.

In discussing the theory of the statutes relating to recordation, notice, and change of possession (with particular reference to Section 2957 and 3440 of the Civil Code of the State of California), the Court, in *Ruggles v. Cannedy*, 127 Cal. 290, at 297, quoted from Chancellor Kent (2 Kent Comm. 523):

“The policy of the law will not permit the owner of personal property to create an interest in another either by mortgage or absolute sale and still continue to be visible owner. *The law will not stop to inquire whether there is actual fraud or not* for it is against sound policy to suffer the vendor to remain in possession \* \* \*



It necessarily creates a secret encumbrance as to personal property, when to the world the vendor or mortgagor appears to be the owner and he gains credit as such and is enabled to *practice deceit upon mankind.*" (Emphasis added.)

Here there was no change of possession, actual or constructive, in *any* form, and the sole act done by the parties to the sale was the preparation and recordination of a bill of sale the effect of which will be discussed below. The bankrupt continued to operate his business in the same manner, under the same name and in the same place as he had prior to the purported sale. Appellant exercised no dominion or control over the Log Boss, or any of the other machinery or equipment of the bankrupt's saw mill.

The recordination of the bill of sale is *not* such an open and unequivocal act as to give evidence to all the world of a transfer of ownership, nor is it sufficient notice to a creditor to check the records for encumbrances on the property before extending credit thereon. See *Pfunder v. Goodwin*, 83 Cal. App. 551, where the Court disregarded a recorded bill of sale, and *Guthrie v. Carney*, *supra*, and *O'Connor v. O'Connor*, 44 Cal. App. 2d 1, at page 4.

In *Dean v. Walkenhorst*, 64 Cal. 78, the Court held that a bill of sale of personal property without transfer of possession from the vendor to the vendee is void as against creditors of the vendor. And in *Francisco v. Aguire*, 94 Cal. 180, the Court said that upon the execution of a bill of sale, title to the personal property vests in the purchaser, although without an

actual delivery and continued change of possession, such title cannot be asserted against the creditors of the vendor.

Nor can the bill of sale be held to be a valid chattel mortgage in that Section 2956 of the Civil Code of the State of California (Form of Personal Property) states in part as follows:

“A mortgage of personal property or crops *shall be clearly entitled on the face thereof, apart from and preceding all other terms of the mortgage,* to be a mortgage of crops and chattels, or either, and such mortgage may otherwise be made in substantially the following form \* \* \*” (Emphasis added.)

and Section 2957 of the Civil Code of the State of California (Requisites to Validity) states, in part, as follows:

“A mortgage of personal property or crops is void as against creditors of the mortgagor and subsequent purchases and encumbrances of the property in good faith and for value, unless

5. [Designation] Each such mortgage is clearly entitled on the face thereof, apart from and preceding all other terms of the mortgage, to be a mortgage of crops and chattels, or either; \* \* \*”

and in *Wehrle v. Marks*, 134 Cal. App. 141, the Court held that where an instrument does not conform to the statute regarding chattel mortgages and there is no change of possession, the transfer is void as against an execution creditor.

Appellee also contends that the insurance policies were in the nature of a third party beneficiary con-

tract. However, we call the Court's attention to the loss payable clause in the insurance contract as set forth in the stipulation relative to loss payable clause (Record on Appeal, p. 56), which clause states that the "loss, if any, shall be payable to the assured and C. A. Chapman *as their respective interests may appear*" (italics ours). To say, as does Appellant, that this loss payable clause amounted to a third party contract for his benefit is to beg the very issue and question involved in this appeal; because, if, as we contend above, his chattel mortgage, as a matter of law, gave him no insurable interest in any of the personal property involved, he had no "interest" to appear and make him a loss-payee in fact as compared with a loss-payee in name only.

**B. Appellant is entitled to nothing from the insurance proceeds by virtue of his chattel mortgage on the mill which was destroyed by fire.**

On page 6 of his Opening Brief, at lines 14 through 20, Appellant states that the bankruptcy cannot affect the contract rights, and Appellant need only show an insurable interest and that he has fulfilled the conditions regarding the insurance contract. However, Appellant either overlooks or ignores the provisions of the Bankruptcy Act hereinafter referred to, and thus cannot show an insurable interest. Even conceding that the law is that (*as between the parties to it*) an unrecorded chattel mortgage is an insurable interest (Appellant's Opening Brief, page 7, lines 2 through 21), Appellant erroneously gives no effect to the status of Appellee herein as a Trustee in Bankruptcy as

opposed to the mortgagor-bankrupt himself. Section 70 (c) of the Bankruptcy Act provides:

“The Trustee may have the benefit of all defenses available to the Bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the Trustee. The Trustee, as to all property of the Bankrupt at the date of bankruptcy whether or not coming into possession or control of the Court, shall be deemed vested as of the date of the bankruptcy with all of the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists.”

See, also;

*Moore v. Bay*, 204 U. S. 4.

The validity of the chattel mortgage can be disposed of more readily by reference to Section 2957 of the Civil Code of the State of California (Requisites to Validity) which states, in part, as follows:

“A mortgage of personal property or crops is void as against creditors of the Mortgagor in subsequent purchases and incumbrances of the property in good faith and for value, unless

4. The Mortgage, if of personal property other than crops growing or to be grown or animate personal property, is recorded in the office of the Recorder of the county where the property mortgaged is located at the time the Mortgage is executed, and *also in the county to which such property is thereafter removed \* \* \**” (Italics ours.)

*In re Mercury Engineering, Inc.*, 68 Fed. Supp. 376, the Court held that non-compliance with this section, either by failure to record or long delay in recording, renders the chattel mortgage invalid as against prior or subsequent creditors and the Supreme Court of the State of California in *Cardenas v. Miller*, 108 Cal. 250, held that an unrecorded mortgage is void as to creditors without regard to good faith or actual notice.

By way of acceptance of the challenge by counsel for Appellant (Appellant's Opening Brief, page 7, lines 7-8) we call the Court's attention to the fact that the rule as to the removal of the property with the consent of the mortgagee is set forth in 11 Corpus Juris 425, and is cited in *Mercantile Acceptance Co. v. Frank*, 64 Cal. App. 230, and as approved in 14 Corpus Juris Secundum 609, is as follows:

"By the better authority it seems that, where the mortgagee has consented to the removal of the property, he will forfeit his right to assert the validity and priority of his lien unless he takes such steps as are required for its protection by the statutes of the state into which the property is removed, or unless he records his mortgage in the state to which the property is removed, or ships the property in his own name; and this general rule has been applied where the mortgagee has knowledge of, although he does not actually consent to the removal and fails to assert his rights under the mortgage within a reasonable time."

**CONCLUSION.**

In view of the facts and law heretofore above set forth, it is the Appellee's contention that Appellant is not the owner of the Log Boss, nor does he have an insurable interest in the Log Boss or in the mill destroyed by fire, and, therefore, has no valid claim, as against the Appellee, to the insurance proceeds.

Dated, San Francisco, California,  
September 30, 1955.

Respectfully submitted,

SHAPRO & ROTHSCHILD,

By ARTHUR P. SHAPRO,

*Attorneys for Appellee.*

DANIEL ARONSON, JR.,  
*Of Counsel.*

No. 14777

---

United States  
Court of Appeals  
for the Ninth Circuit

---

HENRY E. RUBELT, by Raymond Edward Ash-  
by, his grandson and next friend,  
Appellant,  
vs.  
D. O. BYBEE and W. A. BYBEE,  
Appellees.

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Transcript of Record

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Appeal from the United States District Court for the  
District of Idaho, Southern Division

FILED

AUG 30 1955

PAUL P. O'BRIEN, CLERK





No. 14777

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United States  
Court of Appeals  
for the Ninth Circuit

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HENRY E. RUBELT, by Raymond Edward Ash-  
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In the United States District Court for the District of Idaho, Southern Division

No. 2994

HENRY E. RUBELT, by Raymond Edward Ashby, his grandson and next friend,  
Plaintiff,

vs.

D. O. BYBEE and W. A. BYBEE,  
Defendants.

COMPLAINT

(For cancellation of instruments and for damages)

I.

The plaintiff, Henry E. Rubelt, by Raymond Edward Ashby, his grandson and next friend, for his claim alleges:

II.

The plaintiff, Henry E. Rubelt, and Raymond Edward Ashby, his grandson and next friend, are citizens of the State of Idaho. The defendants, D. O. Bybee and W. A. Bybee are citizens of the State of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

III.

On April 12, 1950, and at all times thereafter, the plaintiff, Henry E. Rubelt, is and has been an old man over eighty years of age, hard of hearing, partially blind, infirm in mind and body, and wholly

incompetent to transact and carry on his business affairs.

#### IV.

The plaintiff, Henry E. Rubelt, is now and at all times mentioned herein, has been the owner of the following described real property:

(a) Approximately 2500 acres of deeded land, to-wit:

Real property situate in the County of Owyhee, State of Idaho, and particularly described as follows:

The north half of the northeast quarter, the east half of the northwest quarter and the southeast quarter of Section 13; the east half, the east half of the northwest quarter, the southwest quarter of the northwest quarter and the southwest quarter of Section 25; and the southeast quarter of the southeast quarter of Section 26, all in Township 13 South, Range 1 East, Boise Meridian;

The east half of the southwest quarter, and Lots 3 and 4 of Section 18; the east half of the west half and Lots 1, 2 and 3 and the southwest quarter of the southeast quarter of Section 19; the west half of the northeast quarter, the northwest quarter of the southeast quarter and the northeast quarter of the southwest quarter of Section 30, all in Township 13 South, Range 2 East, Boise Meridian;

The east half of the southeast quarter of Section 1, the east half of the east half of Section 12 and the east half of the northeast quarter of Section 13, all in Township 14, South, Range 1 East, Boise Meridian;

Lots 5, 6 and 7 of the Section 6; Lots 1, 3 and 4 and the east half of the southwest quarter of Section 7; the west half of the northwest quarter and the north half of the southwest quarter of Section 15; and Lots 1 and 2 and the east half of the northwest quarter of Section 18, all in Township 14 South, Range 2 East, Boise Meridian; and all other real property, if any, now owned by the lessor in Owyhee County, Idaho.

(b) Land Leases from the State of Idaho, to-wit:

Lease No.	Description	Acreage	Expiration Date	Yearly Rental
10347	All of Sec. 36, T. 11 S., R. 4 W., Boise Meridian.....	640	12-31-53	\$ 57.60
11093	All of Sec. 36, T. 13 S., R. 1 W., Boise Meridian.....	640	12-31-54	44.80
8894- (14122)	All of Sec. 36, T. 13 S., R. 1 E., Boise Meridian .....	640	12-31-61	44.80
9562- (14756)	All of Sections 16 and 36, T. 14 S., R. 1 E., Boise Meridian .....	1286.11	12-31-62	90.03
Total Yearly Rental.....				\$237.23

## V.

The said real property owned by plaintiff, Henry E. Rubelt, as aforesaid, is now and at all times mentioned herein has been operated as a cattle ranch. Located on said real property and there constructed by plaintiff are numerous out-buildings and a large stone ranch house. Also located on the property and there constructed by plaintiff are two large reservoirs for the storage of irrigation water, and over three-hundred acres of hay land is thus under irrigation, from which hay is and for many years

past has been grown and produced in an amount of over four-hundred tons yearly. Appurtenant to said real property was and is a Federal Grazing Right to graze 475 head of cattle and horses upon the public domain, and said grazing right was and is recognized by the Bureau of Land Management, United States Department of Interior, as being a Class I right.

## VI.

On or about April 12, 1950, plaintiff, Henry E. Rubelt, was living on the above described real property and was by himself and alone attempting to operate the cattle ranch which it comprised; at such time and place the defendant, D. O. Bybee, acting for himself and on behalf of and as agent for the defendant, W. A. Bybee, came to plaintiff's ranch and there fraudulently induced plaintiff, Henry E. Rubelt, to agree to lease plaintiff's ranch to defendants, and thereafter, on or about April 15, 1950, defendant, D. O. Bybee, induced plaintiff to accompany him to the offices of an attorney of the defendants, and at the office of such attorney fraudulently induced plaintiff, Henry E. Rubelt, to execute a lease and option agreement, copy of which is attached to this complaint as Exhibit "A".

## VII.

Thereafter, on or about December 1, 1950, defendants fraudulently induced plaintiff, Henry E. Rubelt, to enter into a written amendment to said lease, said amendment being in words and figures

as set forth in Exhibit "B" attached to and made a part of this complaint.

### VIII.

When plaintiff, Henry E. Rubelt, entered into said agreements, he did not know the fair and reasonable market value of his property, nor did he know its fair rental value; he did not know the fair and reasonable market value of the Federal Grazing Right attached to and appurtenant to said real property, but in truth and in fact believed that it was worth nothing; because of his age and infirmities of mind and body, he was unable to ascertain the true value of his property.

### IX.

The defendants, and each of them, were guilty of fraudulent and inequitable conduct in inducing the contracts of lease and option in the following particulars:

(a) The defendant, D. O. Bybee, acting for himself and for the defendant, W. A. Bybee, intending thereby to induce the execution by plaintiff of the agreements set forth herein as Exhibits "A" and "B", falsely represented to plaintiff that the ranch, the subject of the transaction, was worth no more than \$30,000.00 when in truth and in fact, as was well known to defendant, D. O. Bybee, the value of the said ranch was approximately \$150,000.00.

(b) The defendant, D. O. Bybee, knew of the aged and infirm condition of plaintiff, Henry E. Rubelt, knew that plaintiff was ignorant of the

fair and reasonable market value of his property, and knew that the information upon which plaintiff was basing his conception of values had reference to values and transfers twenty to thirty years prior to the date of this transfer, and especially prior to the enactment of the Taylor Grazing Act; notwithstanding such knowledge, defendant, D. O. Bybee, concealed from plaintiff the fact that the true value of the ranch was several times greater than the plaintiff thought it to be.

(c) At the time the plaintiff executed the agreements, herein Exhibits "A" and "B", plaintiff was alone and without the advice of counsel. When plaintiff requested time to consult an attorney regarding the agreement, herein Exhibit "A", he was informed by defendant, D. O. Bybee, by and through defendants' attorney, that the agreement was "all in your favor", and that he should sign it.

## X.

The agreements herein set forth as Exhibits "A" and "B" are grossly unfair, inequitable and unconscionable, and are fraudulent in that they were by the defendant, D. O. Bybee, intentionally so worded and prepared as to be deceptive to a person of the age and infirmities of the plaintiff, Henry E. Rubelt, and the defendant, D. O. Bybee, did intend thereby to deceive plaintiff and to thereby induce him to execute said agreements, and as a result of said deception, plaintiff did execute the agreements. The particulars in which the agreements are decep-

tive, unfair, unconscionable, inequitable and fraudulent are as follows:

(a) The agreements purport to carry a rental of \$30,000.00 for a ten-year term, whereas in truth and in fact, as defendants well knew, the provisions therein require the plaintiff to pay the taxes and the state land lease rentals, amounting to approximately \$1,000.00 per annum, and thus reduce the actual rental to \$20,000.00 over the ten-year period.

(b) The agreements contain an option to purchase, with a purported purchase price of \$40,000.00, whereas in truth and in fact, as the defendants well knew, the amount to be realized both for rent and as payments toward the purchase price by the defendants could be as little as \$30,000.00 since the taxes and state land lease rentals to be paid by plaintiff during the period of the lease amount in the aggregate to the sum of \$10,000.00.

(c) The agreements contain an option to purchase with a purported purchase price of \$40,000.00 whereas in truth and in fact, as defendants well knew, at the end of the rental period the purchase price additional required to be paid was only \$10,000.00; at the time the agreements set forth in Exhibits "A" and "B" herein were entered into, the reasonable rental value of the premises for a ten-year term without an option to purchase was \$75,000.00, and the fair and reasonable market value of the premises on a sale wherein the first ten years' rental applies to the purchase price, was \$175,000.00.

## XI.

That plaintiff, Henry E. Rubelt, did not and because of his infirmities could not read said agreements prior to signing them, nor were they read to him; he did not discover the fraud and deception that had been perpetrated upon him as aforesaid, nor did he discover the inequitable, unconscionable and unfair nature of the transaction until said agreements and the facts and circumstances surrounding their execution were presented to his attorneys in April of 1953.

## XII.

The option provisions of the said agreements are entirely and wholly without consideration to plaintiff and are therefore void and without any force or effect whatever, either in law or in equity.

Wherefore, plaintiff, Henry E. Rubelt, by his grandson and next friend, Raymond Edward Ashby, prays for relief as follows:

(a) That the lease and option agreement, herein Exhibit "A", and the amendment thereto, herein Exhibit "B", be delivered up by defendants and the same be decreed by this court to be cancelled, annulled, void and rescinded.

(b) That defendants be ordered to forthwith deliver possession to plaintiff of the real and personal property described in Paragraph IV of this complaint and in Exhibit "A" herein, and to vacate the same.

(c) That plaintiff have judgment against defend-



ants, and each of them, in the amount of \$13,500.00, being the difference between the fair rental value of said premises for the year 1950, 1951 and 1952, and the amount received by plaintiff pursuant to said agreement.

(d) That plaintiff have such other and further relief as to the court may seem just and proper.

SMITH & EWING,

CARVER, McCLENAHAN &  
GREENFIELD,

/s/ By GEORGE G. GREENFIELD,  
Attorneys for Plaintiff

### EXHIBIT "A"

### LEASE AND OPTION

Parties: Henry E. Rubelt, a widower, Lessor, and  
C. O. Bybee and W. A. Bybee, Lessees.

Subject: Owyhee County Ranch.

This Indenture of Lease, Made and entered into this 12th day of April, 1950, by and between Henry E. Rubelt, a widower, hereinafter designated as the lessor, and D. O. Bybee and W. A. Bybee, hereinafter designated as the Lessees;

Witnesseth: That for and in consideration of the covenants and agreements hereinafter mentioned to be kept and performed by the lessees, the lessor has leased and by these presents does lease, let and demise unto the said lessees the following described real and personal property, situate in the County

## Exhibit "A"—(Continued)

of Owyhee, State of Idaho, and particularly described as follows:

The north half of the northeast quarter, the east half of the northwest quarter and the southeast quarter of Section 13; the east half, the east half of the northwest quarter, the southwest quarter of the northwest quarter and the southwest quarter of Section 25; and the southeast quarter of the southeast quarter of Section 26, all in Township 13 South, Range 1 East, Boise Meridian;

The east half of the southwest quarter, and Lots 3 and 4 of Section 18; the east half of the west half and Lots 1, 2 and 3 and the southwest quarter of the southeast quarter of Section 19; the west half of the northeast quarter, the northwest quarter of the southeast quarter and the northeast quarter of the southwest quarter of Section 30, all in Township 13 South, Range 2 East, Boise Meridian;

The east half of the southeast quarter of Section 1, the east half of the east half of Section 12 and the east half of the northeast quarter of Section 13, all in Township 14 South, Range 1 East, Boise Meridian;

Lots 5, 6 and 7 of Section 6; Lots 1, 3 and 4 and the east half of the southwest quarter of Section 7; the west half of the northwest quarter and the north half of the southwest quarter of Section 15; and Lots 1 and 2 and the east half of the northwest quarter of Section 18, all in Township 14 South, Range 2 East, Boise Meridian; and all other real

## Exhibit "A"—(Continued)

property, if any, now owned by the lessor in Owyhee County, Idaho.

All real property described in Land Leases Nos. 8894, 9562, 10347 and 11093, issued by the State of Idaho to the lessor, and hereby subleased to the lessees.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, including all water rights, ditch rights, reservoirs and reservoirs sites and including all grazing rights and privileges appurtenant to said land.

Personal Property, described as follows:

- 2 Hay-rakes;
- 2 Buck-rakes;
- 2 Derricks;
- 1 Eversman land leveler;
- 2 hand plows;
- 1 Three-section harrow;
- 2 Wagons, and two McCormick-Deering  
mowers

To Have and to Hold the same unto the said lessees from the date hereof until the 1st day of April, 1960, subject to the terms and conditions of this lease; provided, however, that the lessor shall have thirty days from the date hereof within which to vacate his residence house on said premises.

In consideration of the premises the parties

## Exhibit "A"—(Continued)

hereto have mutually agreed as follows:

1. Rent. The lessees shall pay as rent for said premises for said ten year term the sum of \$30,000.00, payable in annual installments of \$3,000.00 each. The first installment of \$3,000.00 has been paid coincident with the execution of this lease and the receipt of the same is hereby acknowledged by the lessor. The second installment of \$3,000.00 shall be paid on or before the 1st day of April, 1951, and a like installment of \$3,000.00 shall be paid on or before the 1st day of each and every year thereafter during the term of this lease.

2. Taxes and State Rentals. The lessor agrees to pay all taxes levied or assessed against said real property during the term of this lease and the lessor further agrees to pay the rentals falling due under said State Land Leases, and to renew said leases if the same expire during the term of this lease unless prevented from renewing the same because of circumstances beyond the control of the lessor.

3. No Assignment or Sublease. It is agreed that the lessees shall not assign this lease nor sublet any part of said premises or personal property without first obtaining the written consent of the lessor.

4. Right of Free Entry. The lessor or his agents, heirs or assigns, shall have and they are hereby granted the right of free entry upon said premises at any time during the term of this lease for the purpose of determining whether or not the conditions of this lease are being fulfilled.

## Exhibit "A"—(Continued)

5. Care of Premises. The lessees agree to keep up and maintain in as good a state of repair as the same now are all buildings, stables, fences, machinery, reservoirs, ditches and other improvements on said premises and to return them upon expiration of this lease by lapse of time or otherwise in as good a condition as the same were at the time of the commencement of this lease, natural wear and tear from the ordinary use thereof excepted. All labor and materials for keeping up and maintaining said property shall be furnished at the sole expense of the lessees. Any part of said personal property lost or destroyed by the lessees shall be immediately replaced by the lessees with property of like kind and quality, title to which shall immediately vest in the lessor. Said personal property shall not be removed from the real property above described except upon the written consent of the lessor and shall be used by the lessees only in connection with their operations on the lessor's real property above described. The lessees agree that they will keep said premises and improvements and all other property hereby leased free and clear of all liens and encumbrances of every kind and nature whatsoever, save and except current taxes which shall be paid by the lessor. The lessees agree to take all reasonable precautions to prevent the growth or introduction of noxious weeds upon said premises and to destroy such weeds as are now present and the lessees further agree to perform all of their operations on the leased premises in a

## Exhibit "A"—(Continued)

good and husbandlike manner and in accordance with the usual course of husbandry, having in mind the preservation of said property and premises in as good a condition as the same now are, natural wear and tear thereof excepted.

6. Abandonment. If the lessees shall vacate or abandon said premises without the consent of the lessor, his heirs or assigns, prior to the termination of this lease, the lessor may at his option re-lease said property and premises for such rent and upon such terms as the lessor may see fit, and if a sufficient sum shall not be realized, after paying the expenses of such reletting, to satisfy the rent hereby reserved, the lessees agree to pay and satisfy such deficiency upon demand.

7. Remedies Upon Default. If default be made in the payment of the rent above reserved, or any part thereof, or in the performance of any of the other terms and conditions hereof, to be kept and performed by the lessees the lessor, his heirs or assigns, shall first give the lessees thirty days' notice in writing, which said notice shall specify wherein the lessees have failed to comply with this agreement and which said notice shall be delivered to the lessees, or either of them, personally, or may be sent to either of them by registered mail addressed to them at Riddle, Idaho, which is hereby declared by the lessees to be their usual post office address for the purpose of this lease. If sent by mail, said notice shall be considered as served upon the lessees the date it is deposited in any United States Post

## Exhibit "A"—(Continued)

Office enclosed in a sealed envelope with postage thereon duly prepaid and directed, registered and addressed to the lessees at the address above mentioned. If the lessees fail to correct such default within said thirty day period, the lessor, his heirs or assigns, may without further notice declare this lease terminated and re-enter and retake possession of said premises, with or without process of law, and may remove the lessees or any other person or persons occupying said premises and the lessees agree that in case of such default they will immediately deliver up peaceable possession of said premises to the lessor, his heirs or assigns, upon demand. The lessor, his heirs or assigns, may further, at their option and after notice as hereinbefore provided, for default of the lessees in performing any of the terms hereof, declare the whole amount of the rent hereby reserved, due and payable at once and proceed at once to recover the same, together with any damages which may be sustained by the lessor as the result of the lessees' failure to comply with the terms of this lease. The remedies herein mentioned shall be construed as cumulative and not as exclusive and shall not preclude the lessor from exercising any other right or remedy granted by law.

8. Option to Purchase. The lessors shall have and they are hereby granted the exclusive right, privilege and option to purchase all of the property and premises hereby leased, including all water rights, reservoirs and ditch rights, and including said

## Exhibit "A"—(Continued)

State of Idaho Land Leases, for the sum of \$40,000.00, upon the terms and conditions as follows:

(a) This option shall be in full force and effect only for the last month of the term of this lease, being the month of March, 1960, and if the lessees fail to exercise said option during the month of March, 1960, this option shall be forfeited and shall be of no further force and effect.

(b) If the lessees elect to exercise this option, they shall notify the lessor, his heirs or assigns, in writing during the month of March, 1960, of their intention to exercise this option, and at the same time the lessees shall pay over and deliver to the lessor, his heirs or assigns, the sum of \$3,000.00 in cash, lawful money of the United States of America. All rent moneys theretofore paid under this lease, being the sum of \$30,000.00, shall be applied upon the option price, together with the sum of \$3,000.00 paid coincident with the exercise of said option, and the balance of \$7,000.00 shall be paid at the times and in amounts as follows:

The sum of \$3,000.00 on or before the 1st day of April, 1961, and the balance of \$4,000.00 on or before the 1st day of April, 1962.

(c) The deferred balance of said purchase price, being the said sum of \$7,000.00, shall bear interest from the date of said option is exercised until paid at the rate of three per cent per annum, and said interest shall be paid annually, coincident with the annual payment upon the purchase price.

(d) Taxes levied and assessed against said prop-



## Exhibit "A"—(Continued)

erty for the year 1960 shall be pro-rated between the parties hereto as of the time said option is exercised and taxes for all subsequent years shall be paid by the lessees at the time the same become due and before the same go delinquent and if the lessees fail to pay said taxes herein agreed by them to be paid before the same go delinquent, the lessor, his heirs or assigns, may declare the lessees in default under the terms of this agreement, or may at their option make any payment deemed by them to be necessary to protect the title to the property herein sold, and any such payment made by the lessor shall be considered as a portion of the unpaid purchase price and shall draw interest at the rate of three per cent per annum from the date of payment until repaid by the lessees and the lessees agree to repay the same upon demand.

(e) All lease rentals falling due for said State of Idaho Land Leases subsequent to the date of the exercise of said option shall be paid by the lessees.

(f) Coincident with the exercise of said option, the lessor, his heirs or assigns, agree to place in escrow with the First Security Bank of Idaho, National Association, at Mountain Home, Idaho, a good and sufficient warranty deed executed by the lessor, his heirs or assigns, and conveying to the lessees the real property above described, together with bill of sale conveying to the lessees all of said personal property and together with assignments of all of said State of Idaho Land Leases then remaining in force and together with assignments of

## Exhibit "A"—(Continued)

any easements on reservoir rights held by the lessor and together with an abstract or abstracts of title compiled by a legally bonded abstractor showing good and marketable title to said real property to be vested in the lessor, his heirs or assigns, or in lieu of said abstract or abstracts of title, title insurance written by a title insurance company authorized to do business within the State of Idaho, may be furnished. At the same time the parties hereto shall execute an escrow agreement with said bank and said bank shall be and it is hereby authorized and directed to deliver the said warranty deed, bill of sale and other instruments to the lessees upon their depositing in said bank to the credit of the lessor, his heirs or assigns, the deferred payment of purchase price above mentioned, together with interest at the times specified above, time being made the essence of said payments and of this agreement, and upon a compliance with the other terms and conditions hereof; otherwise, said warranty deed and other instruments shall be returned to the lessor, his heirs or assigns. An executed copy of this lease and option shall be deposited with said bank and shall be directions and instructions to it with reference to the terms and conditions of this agreement. All escrow charges of said bank shall be paid by the lessees and the lessor, his heirs or assigns, agree to affix to said warranty deed the necessary Federal Revenue stamps prior to the delivery thereof to the lessees, after payment of said purchase price with interest.

## Exhibit "A"—(Continued)

(g) In the event this option to purchase is exercised, time is agreed to be of the essence of said payments of purchase price and of this agreement and full performance by the lessees of all their obligations hereunder is and shall be a condition precedent to their right to a conveyance hereunder. In the event the lessees fail to comply with any of the terms of this option to purchase, the lessor, his heirs or assigns or said escrow holder, shall first give the lessors thirty days' notice in writing specifying the lessees have failed to comply with this agreement and which said notice shall be delivered to the lessees or either of them, personally, or may be sent to either of them by registered mail, addressed to them at Riddle, Idaho, which is hereby declared by the lessees to be their usual post office address for the purpose of this agreement. Said notice may be served upon the lessees either by the lessor or by the escrow holder above mentioned. If the lessees fail to correct such default within said thirty day period, the lessor, his heirs or assigns, may at their option declare the whole unpaid balance of said purchase price, with interest, immediately due and payable and proceed at once to recover the same, or declare a forfeiture of all of the rights of the lessees under this agreement and of all of their interest in and to the real and personal property above described and the lessor, his heirs or assigns, may thereupon take immediate possession of said property, retaining all sums theretofore paid by the lessees for the use and occupation of

## Exhibit "A"—(Continued)

said property during the time that possession of the same is retained by the lessees under this agreement, or bring an action in equity or at law for specific performance with damages.

9. Costs. In the event it becomes necessary for either of the parties hereto to enforce their rights hereunder by an action at law or otherwise, the defaulting party agrees to pay in such case a reasonable attorney's fee incurred by the party not in default hereunder.

10. No Oral Alterations. Strict compliance with all of the terms of this lease shall be considered as the essence hereof, and no change or modification shall be made in the terms hereof unless the same shall be reduced to writing and shall be signed by the parties hereto. Any extensions of time granted the lessees in the payment of any of the said rent or in the performance of any other term of this lease shall not constitute or be construed to be a waiver of the lessor's right to insist upon prompt payment of any other portion of said rent or strict performance of any other term of this agreement.

11. Covenant. The lessor agrees that the lessees performing the terms and conditions hereof shall peacefully and quietly have, hold and enjoy the said property and premises during the term hereof.

12. Heirs and Assigns. The terms and conditions of this agreement shall extend to and be binding upon the heirs, administrators, executors and assigns of the respective parties hereto.

Exhibit "A"—(Continued)

In Witness Whereof, the said parties have hereunto set their hands the day and year in this agreement first above written.

HENRY E. RUBELT,

Lessor

D. O. BYBEE,

W. A. BYBEE,

Lessees

State of Idaho,  
County of Elmore—ss.

On this 15th day of April, in the year 1950, before me, the undersigned, a Notary Public in and for the said State, personally appeared Henry E. Rubelt and D. O. Bybee, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

PERCE HALL,

Notary Public for Idaho, residing at Mountain Home, Idaho.

State of Oregon,  
County of Malheur—ss.

On this 20th day of April, in the year 1950, before me, the undersigned, a Notary Public in and for said State, personally appeared W. A. Bybee,

## Exhibit "A"—(Continued)

known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed by official seal the day and year in this certificate first above written.

HAROLD HENIGSON,

Notary Public for Oregon, residing at Nyssa, Oregon.

## EXHIBIT "B"

## Amendment Contract

Amendment contract, made and entered into this 1st day of December, 1950, by and between Henry E. Rubelt, a widower, hereinafter referred to as the Lessor, and D. O. Bybee and W. A. Bybee, hereinafter referred to as the Lessees, Witnesseth:

Whereas, upon the 12th day of April, 1950, the said Henry E. Rubelt, as lessor, made and entered into a Lease and Option Agreement in writing whereby he leased to the said D. O. Bybee and W. A. Bybee, as Lessees, certain real and personal property, situate in the County of Owyhee, State of Idaho, more particularly described in the said Lease and Option Agreement of April 12, 1950, to which reference is hereby made for a full and complete description of said property, and,

Whereas, the said property was leased to the said Lessees for a term commencing upon the date of said lease and ending upon the 1st day of April,

## Exhibit "B"—(Continued)

1960, and said lease and option provided, among other things, that during the last month of the term of said lease the Lessees should have the right, privilege and option to purchase all of the property and premises thereby leased, and the parties hereto desire to amend said lease and option to provide that the Lessees should have the exclusive right, privilege and option to purchase all of said property and premises during the last five years of the term of said lease, now, therefore:

In consideration of the sum of One Dollar paid by the Lessees to the Lessor, and in consideration of the mutual covenants and agreements herein contained, it is hereby understood and agreed as follows:

1. That paragraph 8 of the said Lease and Option, dated April 12, 1950, between the parties hereto, shall be and the same is hereby amended to read as follows:

8. Option to Purchase. The Lessees shall have and they are hereby granted the exclusive right, privilege and option to purchase all of the property and premises hereby leased, including all water rights, reservoirs and ditch rights, and including said State of Idaho leases, for the sum of \$40,000.00, upon the terms and conditions as follows:

(a) This option shall be in full force and effect only during the last five years of the term of this lease, being the period from April 1, 1955, to April 1, 1960, and if the Lessees fail to exercise said option during said five year period, this option shall

## Exhibit "B"—(Continued)

be forfeited and shall be of no further force or effect.

(b) If the Lessees elect to exercise this option, they shall notify the the Lessor, his heirs or assigns, in writing during the last five years of the term of said lease of their intention to exercise this option, and at the same time the Lessees shall pay over and deliver to the Lessor, his heirs or assigns, the sum of \$3,000.00 in cash, lawful money of the United States of America. All rent monies theretofore paid under this lease shall be applied upon the purchase price, together with the sum of \$3,000.00, paid coincident with the exercise of said option, and the balance of said purchase price (the total purchase price being \$40,000.00) shall be paid at the time and in amounts as follows:

The sum of \$3,000.00 on or before the 1st day of April immediately following the date of the exercise of said option and the sum of \$3,000.00 on or before the 1st day of April of each year thereafter until the 1st day of April, 1962, at which time the entire unpaid balance of said purchase price, with accrued interest shall be due and payable.

(c) The deferred balance of said purchase price shall bear interest from the date said option is exercised until paid at the rate of three percent per annum and said interest shall be paid annually, coincident with the annual payment upon the purchase price.

(d) Taxes levied and assessed against said property for the year in which said option is exercised



## Exhibit "B"—(Continued)

shall be pro-rated between the parties hereto as of the time said option is exercised, and taxes for all subsequent years following the date said option is exercised shall be paid by the Lessees at the time the same become due and before the same go delinquent and if the Lessees fail to pay said taxes herein agreed by them to be paid before the same go delinquent, the Lessor, his heirs or assigns, may declare the Lessees in default under the terms of this agreement, or may at their option make any payment deemed by them to be necessary to protect the title to the property herein sold, and any such payment made by the Lessor, his heirs or assigns, shall be considered as a portion of the unpaid purchase price and shall draw interest at the rate of three percent per annum from the date of payment until repaid by the Lessees, and the Lessees agree to repay the same upon demand.

(e) All lease rentals falling due for said State of Idaho land leases subsequent to the date of the exercise of said option shall be paid by the Lessees.

2. That all other terms and conditions of said lease and option of April 12, 1950, executed between the parties hereto, shall remain in full force and effect without change or modification of any kind and more particularly paragraphs 8(f) and 8(g), shall remain in full force and effect without change or modification of any kind and this amendment shall hereafter be considered as a portion of the original contract as though originally incorporated therein and the terms and conditions of this

## Exhibit "B"—(Continued)

amendment contract shall be subject to all of the rights, privileges, immunities and remedies specified in the original lease and option of April 12, 1950.

3. The granting of this extension of time for the exercise of said option shall not be construed as a waiver of any of the rights of the Lessor to insist upon strict and prompt performance of all of the terms and conditions of said Lease and Option, as amended by this Amendment Contract.

In witness whereof, the said parties have hereunto set their hands the day and year in this agreement first above written.

HENRY E. RUBELT,

Lessor

D. O. BYBEE,

W. A. BYBEE,

Lessees

State of Idaho,

County of Elmore—ss.

On this 13th day of December, in the year 1950, before me, the undersigned, a Notary Public in and for said State, personally appeared Henry E. Rubelt and D. O. Bybee, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand

Exhibit "B"—(Continued)

and affixed my official seal the day and year in this certificate first above written.

[Seal]                      PERCE HALL,  
Notary Public for Idaho. Residing at Mountain  
Home, Idaho.

State of Oregon,  
County of Malheur—ss.

On this 21st day of December, in the year 1950, before me, the Undersigned, a Notary Public in and for said State, personally appeared W. A. Bybee, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]                      HAROLD HENIGSON,  
Notary Public for Oregon. Residing at Nyssa, Oregon. Commission expires 9/1/51.

[Endorsed]: Filed May 15, 1953.

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[Title of District Court and Cause.]

ANSWER

Defendant answer plaintiff's complaint as follows:

I.

Deny all of the allegations in said complaint con-

tained excepting only those hereinafter specifically admitted.

## II.

Answering paragraph II of said complaint defendants admit that plaintiff Henry E. Rubelt and his next friend Raymond Edward Ashby are citizens of the State of Idaho and that defendant W. A. Bybee is a citizen of the State of Oregon. Deny that defendant D. O. Bybee is a citizen of the State of Oregon and affirmatively allege that defendant D. O. Bybee is a citizen of the State of Idaho and that by reason thereof the court has no jurisdiction in the premises. Further answering paragraph II of said complaint defendants deny that the matter in controversy exceeds exclusive of interest and costs the sum of Three Thousand Dollars (\$3,000.00) and affirmatively allege that the matter in controversy is an equitable one for cancellation of a written contract and that any claim of plaintiff for damages is wholly collateral to the issues in the case and sham, irrelevant and immaterial and that by reason thereof the court has no jurisdiction in the premises.

## III.

Answering paragraph IV of said complaint defendants admit the allegations contained therein and affirmatively allege that the ownership of the plaintiff is subject to the rights of the defendants as contained in the lease and option agreements attached to plaintiff's complaint marked Exhibits A and B.

## IV.

Answering paragraph V of said complaint defendants admit that there are numerous outbuildings and a large stone ranch house on said premises but allege that the outbuildings were at the time of the execution of Exhibit A in very poor condition; admit that there are two reservoirs on the premises but deny that the same are large; deny that there are over 300 acres of hay land under irrigation; deny that said land does now produce or for many years in the past has produced over 400 tons of hay per year; affirmatively allege that said land produces approximately 250 tons of hay per year; admit that appurtenant to said premises is a federal grazing permit to graze cattle and horses upon the public domain and affirmatively allege that such stock may graze upon the federal domain only portions of the year and denies that such permit is for 475 head of stock for the full period of use.

## V.

Answering paragraph VI of said complaint deny the allegations therein contained and allege that plaintiff was at all times represented by legal counsel of his own choosing; that defendants were at no time represented by legal counsel and the contracts, Exhibit A and B, were prepared by plaintiff's counsel.

## VI.

Deny the allegations contained in paragraphs III, VII, VIII, IX, X, XI and XII of said complaint.

For a further and separate defense defendants allege:

## I.

That ever since the dates of execution of the instruments attached to plaintiff's complaint marked Exhibits A and B, plaintiff has known of the terms thereof but during the entire period of over three years until the commencement of this action, plaintiff did not assert any claim against defendants.

## II.

That plaintiff has retained at all times the benefits of said contracts and all money received thereunder and has never returned or made any offer to return any part thereof; that defendants have since the execution of Exhibit A acted in good faith and reasonably relied upon said instrument and the amendment thereto, Exhibit B, and have substantially and materially altered their position in full reliance upon said instruments.

## III.

That by reason of the premises the plaintiff is estopped by laches from asserting at this time the claims set forth in his complaint.

Wherefore, defendants pray that plaintiff take nothing by reason of his complaint and that they be recompensed for costs and disbursements incurred herein.

ANDERSON, KAUFMAN  
and KISER

/s/ By EUGENE H. ANDERSON,  
Attorneys for Defendants.

Acknowledgment of Service attached.

[Endorsed]: Filed August 19, 1953.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on for trial before the court without a jury on the 8th day of February, 1955, the plaintiff Henry E. Rubelt appearing in person and by his attorneys Smith and Ewing and Carver, McClenahan and Greenfield, and the defendants appearing in person and by their attorneys Anderson, Kaufman and Anderson, and testimony having been offered by the plaintiff in support of his complaint and the plaintiff having rested his case, and defendants having moved the court for a judgment of dismissal on the grounds that the plaintiff, upon the facts and the law, had shown no right to relief as prayed for in his complaint, and the court having heard oral argument from opposing counsel relative to the motion and having considered the same and being advised fully in the premises, granted said motion, and plaintiff having thereafter filed a motion to reopen the case and submit further testimony relative to diversity of citizenship of the plaintiff and defendants and the court having granted said motion and the case having been reopened and there having been offered and admitted in evidence the deposition of defendant D. O. Bybee and defendants having thereafter renewed their motion for dismissal and the court having again granted said motion, now makes and

files its findings of fact and conclusions of law as follows:

### Findings of Fact

#### I.

That plaintiff Henry E. Rubelt and Raymond Edward Ashby, his grandson and next friend, are citizens of the State of Idaho. That the evidence is insufficient to establish that the defendant D. O. Bybee is not a citizen of the State of Idaho.

#### II.

That the plaintiff Henry E. Rubelt is now, and on or about April 12, 1950, was, the owner of certain real property, approximating 2500 acres, situate in Owyhee County, Idaho, more particularly described in paragraph IV of plaintiff's complaint and plaintiff's Exhibit 1. That such property had situate thereon a stone house and several outbuildings, and had for years been operated as a cattle ranch and attached thereto and appurtenant to the land were Taylor Grazing Rights for 450 head of cattle and 25 horses for use of the public domain for portions of the year.

#### III.

That on or about April 12, 1950, the plaintiff and defendants entered into a lease and option agreement admitted in evidence as plaintiff's Exhibit 1, whereby the defendants leased from the plaintiff Henry E. Rubelt all of plaintiff's property together with the appurtenant Taylor Grazing Rights, for a term of ten years with option to purchase the property during the last month of the leased term. This



agreement was amended on or about December 1, 1950, by the instrument admitted in evidence as plaintiff's Exhibit 2, the substance of the amendment being to enable the defendants to exercise the option to purchase during the last five years of the leased term.

#### IV.

That at the time plaintiff and defendants entered into the original agreement on or about April 12, 1950, the plaintiff was over the age of 80 years and while he was somewhat hard of hearing, had failing eyesight and was somewhat forgetful in some matters, there is no evidence whatsoever that the plaintiff was mentally incapacitated or incompetent, or unable to manage or transact business affairs, nor is there any evidence to indicate whatsoever that the plaintiff did not know the extent and the value of his property and holdings.

#### V.

That there is no evidence to indicate whatsoever that there was any fraud on the part of the defendants or either of them in the negotiations for or the execution of, either the original agreement, plaintiff's Exhibit 1, or the amendment thereto, plaintiff's Exhibit 2.

Whereupon, the court concludes as a matter of law:

#### Conclusions of Law

##### I.

Upon the facts and the law the plaintiff has

shown no right to the relief prayed for in his complaint.

## II.

That defendants have a judgment of dismissal for failure of the plaintiff to prove a right to relief prayed for in his complaint, both on the merits and for failure to prove jurisdiction of this court on diversity of citizenship of the parties.

Let judgment be entered accordingly.

Dated this 2nd day of March, 1955.

/s/ FRED M. TAYLOR,  
United States District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed March 2, 1955.

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In the United States District Court of the District  
of Idaho, Southern Division

No. 2994

HENRY E. RUBELT, by Raymond Edward  
Ashby, his grandson and next friend,  
Plaintiff,

vs.

D. O. BYBEE and W. A. BYEE, Defendants.

## JUDGMENT OF DISMISSAL

The above entitled cause came on duly for hearing before the undersigned, sitting as one of the judges of the District and Division aforesaid, on the 8th day of February, 1955, without a jury;

At the conclusion of the testimony adduced and presented by and on behalf of the plaintiff, counsel for defendants made a motion for judgment of dismissal upon the merits;

The court heard arguments of counsel in support of and against said motion and ordered the same granted. Thereafter plaintiff filed a motion to reopen the case and submit further testimony and evidence relative to the jurisdictional question of diversity of citizenship of the plaintiff and defendants.

Said motion came on for hearing on the 21st day of February, 1955, at the hour of 10:00 o'clock a.m. After hearing arguments of counsel in support of and against said motion, the court granted the same, whereupon further evidence was submitted by plaintiff in behalf of his complaint. Counsel for defendants again made a motion for judgment of dismissal upon the merits and the court having filed its findings of fact and conclusions of law,

It is hereby ordered, adjudged and decreed that said motion be, and the same is hereby, granted, and said action is hereby dismissed upon the merits and that defendants have and recover their costs herein expended.

Let be judgment be entered accordingly.

Dated this 2nd day of March, 1955.

By the Court,

FRED M. TAYLOR,

United States District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed March 2, 1955.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Henry E. Rubelt, by Raymond Edward Ashby, his grandson and next friend, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment of Dismissal entered in this action on March 2, 1955.

CARVER, McCLENAHAN &  
GREENFIELD

/s/ By GEORGE A. GREENFIELD,  
Attorneys for Plaintiff Henry  
E. Rubelt.

[Endorsed]: Filed March 18, 1955.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
District of Idaho—ss.

I, Ed M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify the foregoing papers are that portion of the original files designated by the Appellee and as are necessary to the appeal under Rule 75 (RCP), to-wit:

1. Complaint.
2. Answer.
3. Transcript of Testimony.
4. Deposition of D. O. Bybee.
5. Findings of Fact and Conclusions of Law.
6. Judgment of Dismissal.
7. Notice of Appeal.
8. Designation of Contents of Record on Appeal.
9. Order Extending Time to Docket Appeal to May 24, 1955.
10. Order Extending Time to Docket Appeal to June 16, 1955.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 25th day of May, 1955.

[Seal]                      ED. M. BRYAN,  
                                    Clerk

/s/ By LONA MAUSER,  
                Deputy.

In the United States District Court of the District  
of Idaho, Southern Division

Civil No. 2994

HENRY E. RUBELT, by Raymond Edward  
Ashby, his grandson and next friend,  
Plaintiff,

vs.

D. O. BYBEE and W. A. BYBEE,  
Defendants.

### REPORTER'S TRANSCRIPT

Before the Honorable Fred M. Taylor, United  
States District Judge, for the District of Idaho.

(Trial commenced February 8, 1955).

Appearances: For Plaintiff: George A. Greenfield, Attorney at Law, of Boise, Idaho, and Laurence N. Smith, Attorney at Law, of Caldwell, Idaho. For Defendants: Eugene H. Anderson, Attorney at Law, of Boise, Idaho, and Samuel Kaufman, Jr., Attorney at Law, of Boise, Idaho.

February 8, 1955, 10:00 a.m.

The Court: Are you ready to proceed, gentlemen?

Mr. Greenfield: Yes, we are ready.

Mr. Anderson: We are ready.

The Court: Very well. Do you care to make an opening statement of any kind?

Mr. Smith: Yes, we have a short statement.

Mr. Greenfield: I wonder if as a preliminary matter we could get a stipulation from Mr. Anderson that Exhibits A and B, attached to plaintiff's complaint, being the two agreements here in issue are true copies duly executed by Mr. Rubelt?

Mr. Anderson: Do you have the original?

Mr. Greenfield: No.

Mr. Smith: We have a signed copy. The originals are in the bank.

Mr. Anderson: Why not put them in evidence.

Mr. Greenfield: Is it stipulated that they may be admitted?

Mr. Anderson: Yes, they may be admitted.

The Court: Plaintiff's Exhibits 1 and 2 may be admitted.

(Mr. Smith made opening statement.)

(Mr. Anderson made his opening statement.) [1\*]

The Court: Call your first witness.

### CLARA OCAMICA

having been first duly sworn, testified as follows,  
upon

#### Direct Examination

By Mr. Greenfield:

Q. State your name?

A. Clara Ocamica.

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\* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Clara Ocamica.)

Q. You will have to talk loud enough so that the Court can hear you?

A. Yes, sir.

Q. Where do you reside?

A. I live at Bruneau, Idaho.

Q. How long have you resided at Bruneau?

A. About 21 years.

Q. How old are you? A. 55.

Q. Where were you born?

A. Tuscorora, Nevada.

Q. When did you come to Idaho?

A. When I was a little girl, two.

Q. Two? A. Yes.

Q. You are the daughter, are you not, of Henry Rubelt? A. I am.

Q. One of the parties to the contract here in dispute? [2]

A. I am.

Q. Were you raised on the old Henry Rubelt ranch, that is the property here in question?

A. I was.

Q. You lived there from the time you were two years old until when?

A. Until I was twenty.

Q. You were thoroughly familiar with the place?

A. I am.

Q. How much deeded land is involved on the old Rubelt place?

Mr. Anderson: Object on the ground the record speaks for itself.



(Testimony of Clara Ocamica.)

The Court: Objection sustained.

Q. Did you have a certain amount of land that you leased from the state? A. Yes, we did.

Q. How many acres are involved?

A. 2500.

Mr. Anderson: Object to that on the ground——

Q. (By the Court): You say 2500?

A. Yes.

The Court: It may stand.

Q. Is there a certain amount of meadow or hay land on this place? [3] A. Yes.

Q. How many acres of hay land on the place?

A. About 300.

Q. How much hay through the years year in and year out did you cut on that place? A. 350.

Q. 350 tons of hay a year? A. Yes.

Q. Mrs. Ocamica, there is in question here—one of the issues in the case is the amount of taxes and state land lease rentals that are involved every year. What are the yearly taxes on the place? Just let me ask you if you know what the taxes are; do you know? A. Yes, I know.

Q. How do you happen to know what the taxes are? A. Well, everybody pays taxes.

Q. Did you write the checks on them?

A. Yes.

Q. I ask you what the taxes are yearly on the Rubelt place?

Mr. Anderson: May I inquire?

The Court: Yes.

(Testimony of Clara Ocamica.)

Q. (By Mr. Anderson): Your father, Henry Rubelt, is here in the courtroom? A. Yes, sir.

Q. And he signs the checks for the taxes on his own land? A. He does.

Q. And he makes the payment of those taxes?

A. Yes.

Q. And made those payments back when he lived on the place at the time this contract was made?

A. That I——

Q. You didn't sign any checks back at that time?

A. (No answer.)

Q. You didn't sign any checks the year after the contract was made? A. Yes.

Q. When did you first sign a check for the taxes?

Mr. Greenfield: Never testified she signed the checks.

A. I don't remember.

Mr. Anderson: Object on the ground it is not the best evidence.

The Court: Objection sustained.

Mr. Greenfield: Your Honor, if Mrs. Ocamica makes out the checks and has personal knowledge of how much the taxes are——

The Court: In the first place, you had better tie it down as to time. [5]

Q. (By Mr. Greenfield): In 1950, 1951 and 1952, did you make out the checks for taxes?

A. I don't remember.

Q. Tell me what years you have made the checks out for the taxes?

(Testimony of Clara Ocamica.)

A. I made them out in the last three years that I know of.

Q. In the last three years, that would be 1952, 1953 and 1954?      A. Yes.

Q. And you know what the taxes are for those years?      A. I do.

Q. Now, I will ask you what the taxes are on the Rubelt place during the last three years?

Mr. Anderson: Objection to that—it is incompetent, irrelevant and immaterial, and not the best evidence.

Mr. Greenfield: May I be heard on that?

The Court: Yes.

Mr. Greenfield: One of the issues in this case, if the Court please, is the amount of state land lease rentals, and tax money involved, as it has a bearing upon the net amount of money that Mr. Rubelt realizes from this contract. It is very material to know how much money is involved. [6] The property taxes, if the witness were permitted to testify, would show that it has—that it is just about static amount every year. The witness also knows of her own knowledge the amount of the state land rentals which are always the same amount, and I feel it is most material and we would like to get the evidence in the record.

The Court: I am going to let her answer. I have some doubt about its materiality, but she may answer.

Q. (By Mr. Greenfield): How much are the taxes?      A. Around \$570 for the land.

(Testimony of Clara Ocamica.)

Q. \$570 a year? A. Yes.

Q. And what are the state land lease rentals?

A. They are about \$237 and some cents. I don't know how many.

Q. The two together total in the neighborhood of \$800? A. Yes.

Q. Your father, Mr. Rubelt, was living on the ranch at the time that this contract was made in 1950? A. Yes.

Q. We would like to inquire into the condition of Mr. Rubelt's health just prior to and during that period; how old was he in 1950? [7]

A. Let's see—he is 86 now.

Q. So then in 1950 he would be 81?

A. Yes.

Q. What was the condition of his health with respect to his hearing ability at that time?

Mr. Anderson: Object on the ground that it is immaterial and not within the issues of this case.

The Court: She may answer.

A. He is awfully deaf, he can't hear very good.

Q. (By Mr. Greenfield): Was that the situation in 1950? A. Yes.

Q. What was the condition of his health with respect to his eyesight at that time?

A. He hasn't been able to read a paper for quite a few years.

Q. What was his general condition of health during that period?

(Testimony of Clara Ocamica.)

A. He was sick. My father has asthma, and he is sick a lot.

Q. Did he have a sick spell in the neighborhood of 1950, or either side of it?

A. Yes, he did, he had an operation.

Q. When was that? [8]

A. It was in 1949—it was in the fall of 1949, I think.

Q. And what was his condition and health following the operation?

A. He was very weak.

Q. What kind of a operation was it?

A. Varicose vein.

Q. Now in 1950, in the spring of 1950, when this contract was executed, tell the court what you experienced in your personal observations of your father regarding his mental condition?

Mr. Anderson: We object on the ground it is too general.

The Court: I think, Mr. Greenfield, you had better have the witness testify as to facts.

Q. (By Mr. Greenfield): Mrs. Ocamica, during the time when these contract—this first contract was negotiated in the spring of 1950, what can you tell the court regarding your father's ability to remember things?

Mr. Anderson: We object on the ground that that is incompetent, irrelevant and immaterial. No allegation of mental capacity.

The Court: She may answer.

(Testimony of Clara Ocamica.)

A. His memory isn't very good today and it wasn't good then. [9]

Q. What do you mean by his memory not being good, how do you know it wasn't good?

A. You could tell him the same story every day and two or three times a day and he never remembered it.

Q. What can you tell the court regarding his ability to recognize people that he had known for many years?

A. He couldn't recognize—couldn't recognize anybody, first he couldn't see them and then he just couldn't recognize anybody.

Q. Do you recall instances when people would come to your home and your father would be there and you would introduce them to him and he had known them for many years and wouldn't recognize them?

A. He wouldn't recognize them.

Q. Do you think of any particular instance of that?

A. Yes, he has known Mr. Harley's son for many years, and I would have to run out ahead and tell him who he was so he could talk to him like he knew him. I always do that.

Q. Did you have to do that in 1950?

A. Yes.

Q. In connection with this ranch, does the ranch have certain Federal Range rights?

A. It has.

(Testimony of Clara Ocamica.)

Q. What, if you know, is the extent of the Federal Range right on this ranch? [10]

Mr. Anderson: Object on the ground that is not the best evidence. Mrs. Ocamica is not the owner of this place. The owner is in the courtroom, Mr. Rubelt, and there is a record of those rights.

The Court: I am wondering why some of those records aren't here, or are they going to be.

Mr. Greenfield: We will have the Bureau of Land Management man and he knows the extent of the land right, and so does she.

The Court: She may testify if she knows.

Q. What is your rights on this place?

A. 450 cattle and 25 horses.

Q. Total of 475?

A. Yes, that is right.

Q. (By the Court): How many horses?

A. 25.

Q. (By Mr. Greenfield): Directing your attention to the spring of 1950, Mrs. Ocamica, do you recall a time when the defendant, Mr. D. O. Bybee, came to your place in Bruneau, did you have a conversation with him at that time or did he talk to you? A. No, he didn't. [11]

Q. What did he do when he got there?

A. Well, so many people drove in at that time, but my husband talked to him.

Q. You didn't talk to him at all?

A. No, I never seen him.

Q. Have you ever seen him? A. Yes.

Q. When did you first see Mr. Bybee?

(Testimony of Clara Ocamica.)

A. One time we had a dispute about taxes, and I don't remember who I wrote to, and he came.

Q. Well, what I am trying to get it, Mrs. Ocamica, do you have any personal knowledge of the negotiations of these contracts between Mr. Rubelt and Mr. Bybee?

A. You mean at that time?

Q. Yes.           A. No.

Q. You weren't present during the negotiations?

A. No.

Q. Is there anything you can tell us regarding the general mental condition of Mr. Rubelt during the spring of 1950 that would reflect his ability or inability to transact business?

Mr. Anderson: We object on the ground the question is too general, and calls for a conclusion of the witness. [12]

The Court: Objection sustained.

Q. (By Mr. Greenfield): Mrs. Ocamica, can you say whether or not your father by 1950 had become childish in his ways?           A. Yes.

Q. Now what do you mean by "childish"?

A. He never lives in our country. He will always go back to his childhood. All his talk is Germany, his childhood, when he was a young man growing up.

Q. And that was the condition he was in in 1950?           A. Yes.

Q. You would say then he was living in the past?           A. Yes.



(Testimony of Clara Ocamica.)

Q. Did he seem to take much interest in current things around him?      A. No.

Q. Mrs. Ocamica, will you describe to his Honor the kind of buildings that you have there on the Rubelt place, what is the ranch house like?

A. It is three rooms downstairs, and two upstairs and it is about——

Q. What is it built of?      A. Rock.

Q. Who built it?      A. Mr. Rubelt. [13]

Q. Were you present when it was built?

A. I was.

Q. What outbuildings was there on the premises?

A. There is a big tool shed or a machine shed, and a garage, and a lot of little houses that they kept things in, like oil kegs, and there is a big barn and corrals.

Q. And all those were built by Mr. Rubelt and by the children?      A. That is right.

Q. What reservoirs for the storage of irrigation water exist on the premises?

A. There is two.

Q. How large are they?

A. What do you mean how large?

Q. You don't know how large they are in acre feet or water storage?      A. No, I don't.

Q. During the time you were present on the place were they large enough to store enough water to irrigate the hay land in the summer time?

A. They was.

Q. Did you have any shortage of water?

(Testimony of Clara Ocamica.)

A. No, not that I can think of.

Q. Were these reservoirs built at different times? A. Yes, they were. [14]

Q. When was what you referred to or what is referred to as the new reservoir built?

A. I don't know for sure, but it was built in the 30's.

Q. In the 30's? A. Yes.

Q. After the new reservoir was built there was always plenty of water? A. There was.

Q. When you turned this ranch over to the Bybees in 1950 what was the condition of the ranch generally?

Mr. Anderson: May I inquire in aid of an objection?

Mr. Greenfield: I will withdraw the question.

Q. In 1950 when this ranch was turned over to the Bybees what was the condition of the buildings on the place with reference to their state of repair?

Mr. Anderson: May I inquire in aid of an objection?

The Court: You may.

Q. (By Mr. Anderson): Were you there when the place was turned over to Mr. Bybee?

A. I was there off and on, yes.

Q. Were you there when it was turned over to Mr. Bybee? A. No, I wasn't. [15]

Q. How long had it been since you were there prior to that time?

A. I was there pretty near every year at one time or another.

(Testimony of Clara Ocamica.)

Q. When were you there in 1950?

A. I was there one time right after they put up the hay.

Q. Right after Bybees put up the hay?

A. Yes.

Q. What time of the year was that?

A. I can't remember. It was either in August or around there.

Q. Of 1950?           A. Yes.

Mr. Anderson: We object on the ground no foundation has been laid.

The Court: Objection sustained.

Q. (By Mr. Greenfield): When were you on this place, Mrs. Ocamica, prior to Bybees taking it over?

A. I have been on it almost every year, or every year.

Q. And were you on it in 1950 before Bybees took it over?           A. I don't remember. [16]

Q. Were you there in the summer of 1949?

A. Yes.

Q. Now can there—in the summer of 1949 what was the condition of the buildings and the house as to general state of repair?

Mr. Anderson: Object on the ground that is irrelevant. Mr. Rubelt is here in the courtroom and was there and can testify to the buildings.

Mr. Greenfield: If the woman knows the testimony is competent.

The Court: Your question is too general. Lot of

(Testimony of Clara Ocamica.)

things can happen to a building between the summer of 1949 and April, 1950. She may answer.

A. My father has always been a good rancher.

The Court: You had better answer the question.

Q. What was the general state of repair of the house and outbuildings in 1949?

A. I thought they was in good condition.

Q. Now, Mrs. Ocamica, have you seen the Rubelt place since Mr. Bybee took it over?

A. Yes.

Q. When did you last go out there?

A. I was out in 1950, and then I was out in one spring, but I don't remember. [17]

Q. See if you can think which spring that was?

A. (No answer.)

Q. All right, we will pass that. In 1949 will you state what the general condition of the fences were with respect to whether they were in good or bad condition?

Mr. Anderson: Object on the ground that that is irrelevant.

The Court: She may answer.

A. They were in good condition.

Q. With respect to the reservoirs in 1949, will you state whether or not they were in good repair and capable of storing water?

A. They were.

Q. Now, Mrs. Ocamica, from having lived in the Bruneau-Riddle area all your life, as you have testified, are you generally acquainted with land values in that part of the country?

A. Yes.

(Testimony of Clara Ocamica.)

Q. And are you generally acquainted with the value of grazing rights?      A. Yes.

Mr. Anderson: Object on the ground that is irrelevant and incompetent.

The Court: Well, she may answer that.

A. Yes, I am. [18]

Q. Now from your general acquaintanceship with land values and the value of grazing rights in that part of the country as you have testified, and from your knowledge of the Rubelt place from having lived there a good part of your life, will you give your opinion to the court as to the value of the Rubelt property at the time it was sold to the Bybees?

Mr. Anderson: Object on the ground no proper foundation has been laid, and the evidence is incompetent.

The Court: Objection sustained.

Mr. Greenfield: May I discuss for a moment the question of qualification of a witness for this purpose?

The Court: Yes.

Mr. Greenfield: I would like to refer to Wigmore on Evidence, Volume 3, Section 714, in which Wigmore discusses the qualifications that a witness ought to have in order to—that her or his testimony may be admitted as to value, and in sub-paragraph 5 of Section 714 Wigmore states, “A sufficient qualification is usually declared to exist where the witness is a resident, land-owner, or farmer, in the neighborhood. The phrase differs in different juris-

(Testimony of Clara Ocamica.)

dictions and in [19] different rulings of the same Court; the notion is that of a person who has both an interest and an opportunity to make himself acquainted with land values around him may be permitted to testify." No qualification as a real estate expert is required. If the person is a local resident and land owner in the neighborhood and over a period of time testified he or she has become acquainted with the general land values in the neighborhood, the general rule as I understand it to be, as I think Wigmore states it to be, is that the witness is entitled to testify as to the value of property.

Mr. Anderson: I consider to be the ruling the only person whose business experience or work, or activity which goes to the fixing of values, and the observation of values on land is a competent witness to prove that, except of course that the owner may testify as to value, but that no other person may so testify, except those people who have experience which makes them skilled in determining value. Here this witness has not been qualified in any respect in those particular activities. If this witness can testify as to value, anybody who can read a newspaper can testify as to value.

The Court: I don't think a proper foundation has been laid of this witness, or this witness has [20] been qualified and the objection will be sustained.

Q. (By Mr. Greenfield): You and your son own a ranch near Bruneau?      A. Yes, sir.

(Testimony of Clara Ocamica.)

Q. In past years have you had occasion yourself to purchase and sell ranch property?

A. We have.

Q. Are you acquainted with other sales of property that have been made in that area of property somewhere in character of the Rubelt place?

A. Yes.

Q. From your experience personally in the purchase and sale of ranch property in that area, and from your acquaintance with the purchase and sale of similar property in that area by others, do you have an opinion as to the value of the Rubelt property at the time of this transaction?

A. I have.

Q. I will ask you what is your opinion of the value of the Rubelt property in the spring of 1950?

Mr. Anderson: Object on the ground no proper foundation has been laid and the evidence is incompetent.

The Court: She may answer.

Mr. Anderson: May I inquire, your Honor.

The Court: Yes. [21]

Q. (By Mr. Anderson): Mrs. Rubelt, you are a housewife by occupation?

A. I am not Mrs. Rubelt.

Q. I mean Mrs. Ocamica, I am sorry. You were formerly Miss Rubelt? A. That is right.

Q. You are a housewife by occupation?

A. I am.

Q. And you live with your husband on a farm near Bruneau? A. I do.

(Testimony of Clara Ocamica.)

Q. Quite some distance from the ranch of your father out at Riddle; how far is it out there?

A. About 70 miles.

Q. About 70 miles from Bruneau to Riddle; is that right?

A. I am not sure.

Q. What is it?

A. I am not sure.

Q. Well, approximately?

A. Yes.

Q. And how far is it from Riddle over to the ranch by the road, the ranch of your father?

A. About 12 or 15 miles.

Q. 12 to 15 miles.

A. Yes. [22]

Mr. Greenfield: Your Honor, I would like to object to this line of questioning on the ground it isn't in aid of an objection, it is general cross examination. The Court ruled the witness may testify. If Mr. Anderson wishes to attack the weight of her testimony by general cross examination he will have the opportunity.

Mr. Anderson: It goes to the area.

The Court: I assume you are trying to get at her acquaintance in the area. I think perhaps it goes more to the weight of her testimony, and I am going to give—to let her give her opinion in view of what she has said.

Mr. Anderson: I would like to continue my examination in aid of an objection, just a few questions.

The Court: Very well.

Q. (By Mr. Anderson): Now the ranch you



(Testimony of Clara Ocamica.)

have bought, you and your husband have bought at Bruneau, is the ranch *were* you reside?

A. It is what?

Q. Is the ranch *were* you reside, where you live?

A. Yeah.

Q. When did you buy that ranch where you live?      A. In 1936, I think. [23]

Q. In 1936?      A. Yes.

Q. And you bought only one ranch since that time; is that right?      A. No.

Q. How many have you bought since that time?

A. (No answer.)

Q. Can't you answer that?

A. I don't know. I don't know how to answer that.

Q. Well, did you buy two?      A. Yes.

Q. Two is the amount you bought; is that right?

A. I don't know what you mean.

Q. You say that you have bought ranches, the first ranch that you and your husband bought was the one at Bruneau?      A. That is right.

Q. In 1936?      A. That is right.

Q. Yes, and have you bought any other places since that time?      A. Yes.

Q. Which ones?

A. We bought the "Sewell" place.

Q. Where is that?

A. At Hot Springs. [24]

Mr. Greenfield: I think this is going too far. The court ruled the witness may testify. Mr. Anderson

(Testimony of Clara Ocamica.)

will have ample opportunity to cross examine all day if he wants to.

Mr. Anderson: These questions go to the qualifications.

Mr. Greenfield: Question in aid of objection has already been ruled on.

The Court: Well, I think he is going to the qualifications. I don't know whether he is going to make another objection or not. You may continue. I wouldn't care to have it go on too long.

Q. (By Mr. Anderson): And that was grazing area that your husband and you bought?

A. Yes.

Q. Now what other place did you buy?

A. The Sewell place.

Q. That is the one you just testified to, isn't it?

A. No.

Q. Where is the other place at Hot Springs, when did you buy that?

A. That was Idaho Power, I don't remember the date.

Q. What? [25]

A. That was Idaho Power money.

Q. You don't recall when you bought that?

A. No.

Q. Now your husband of course handled those transactions, didn't he? A. I guess so.

Q. Your husband does the business in your family, doesn't he? A. I guess so.

Q. And he took care of the purchases of those particular places, didn't he?

(Testimony of Clara Ocamica.)

A. His lawyer did.

Q. His lawyer did, but he made the deal, didn't he?  
A. Yes.

Q. You didn't make the deal, did you?

A. I helped.

Q. And that really is the extent of the knowledge that you have as to ranch transactions, isn't it?

A. I don't know what to answer on that. I think husband and wife always works together.

Q. Yes, no doubt about it, but what you told us has been the extent of your knowledge of the property, transactions or sales and purchases, isn't it?

A. I know as much as anybody about it, I guess.

Q. In other words, the knowledge you have is the general knowledge that everybody has in the community; is that right? [26]

A. That is right.

Q. No more, no less.                      A. (No answer.)

Mr. Anderson: We renew the objection.

The Court: I would like to ask the witness a question.

Q. (By the Court): Have you had anything to do with the sale and purchase of any other property other than the property you and your husband bought?  
A. No.

Q. Do you know of any sales immediately prior to April 1950 in the area where your father's land is?  
A. You mean do I know anybody—

Q. Any sale of land at that time immediately prior to or about that time, April, 1950; do you know of any?  
A. (No answer.)

(Testimony of Clara Ocamica.)

Q. You remember when this transaction was made; do you not?      A. Yes.

Q. Do you remember of any sale in that area at that time?

A. I don't know whether I do or not.

The Court: I think I will have to sustain the objection. This witness isn't qualified to know values of this land at that time. [27]

Mr. Greenfield: I would like to make an offer of proof for the record.

The Court: You may do so.

Mr. Greenfield: Comes now the plaintiff and offers to prove by this witness, Mrs. Ocamica, that if Mrs. Ocamica were permitted to testify she would testify that in her opinion the value of the Rubelt place at the time of the contract herein denominated Exhibit A, and entered into in 1950 in the spring, that the value of the Rubelt property at that time, fair market value, was approximately \$100,000.

Mr. Anderson: We object on the ground the witness is not qualified to testify as to that.

The Court: The objection will be sustained. We will take a ten minute recess.

(Whereupon, a recess was taken.)

After recess.

### Cross Examination

Q. (By Mr. Anderson): I think you testified, Mrs. Ocamica, that you were the daughter of Henry Rubelt?      A. I am; yes, sir.

(Testimony of Clara Ocamica.)

Q. And you have one brother?

A. I have. [28]

Q. Will you speak out so I can hear you?

A. I have.

Q. You have one brother, he is Henry Rubelt, Jr.?

A. That is right.

Q. And those are the only two children of your father?

A. That is right.

Q. Your brother, Henry Jr., and yourself?

A. Yes.

Q. And Edward Ashby is your son?

A. Yes, he is.

Q. You have two sons? A. I have.

Q. And their surname is Ashby?

A. Yes.

Q. Edward Ashby is now here as the plaintiff on behalf of Henry Rubelt?

A. It is Raymond Ashby.

Q. The name here is wrong, Edward is wrong?

A. Raymond is correct.

Q. Where is Raymond now?

A. In Tacoma, Washington.

Q. What is the name of your other son?

A. Jim.

Q. Where is Jim? A. In Lewiston.

Q. In Lewiston, Idaho? [29] A. Yes.

Q. You have one daughter? A. I have.

Q. What is her name?

A. Harriet Urquidi.

Q. And your husband's name is Eustaquio Ocamica?

A. Yes, sir.

(Testimony of Clara Ocamica.)

Q. And you live with him at Bruneau?

A. I do.

Q. You have been married for how many years?

A. 25.

Q. To Eustaquio Ocamica? A. Yes, sir.

Q. When did you move to Bruneau?

A. I moved when my daughter was one year old.

Q. How old is she now? A. 22.

Q. You have lived at Bruneau for 21 years?

A. I have.

Q. And prior to that time you lived out at Riddle? A. I did.

Q. Where did you live out at Riddle?

A. Lived at home and then I worked for Sewell.

Q. That is down at the Flying-H Ranch?

A. Yes.

Q. Now since you moved to Bruneau you have been only out [30] to Riddle occasionally?

A. Oh, yes.

Q. Prior to the time that the road was built over there did you go out every year?

A. Yes.

Q. Once a year you went out?

A. Oh, yes.

Q. And that was just for a visit with the old folks out there?

A. Well, I went often when mother lived.

Q. Your mother is not living; is that right?

A. No.

Q. She is dead? A. Yes.

(Testimony of Clara Ocamica.)

Q. When did she die, as near as you can recall?

A. In 1939.

Q. In 1939? A. Yes.

Q. And since that time you have been out there only occasionally? A. Yes.

Q. Now what were the nature of your visits, Mrs. Ocamica, did you go back the same day?

A. No, she would stay a day or two—I mean I would stay a day or two. [31]

Q. When you were there in 1949 how long did you stay? A. I don't remember.

Q. And where did you spend your time there, at the home there at the ranch?

A. Never stayed in the house.

Q. Where did you spend your time?

A. Running around about the ranch.

Q. With whom? A. My brother.

Q. Your brother? A. Yes.

Q. Henry Rubelt, Jr.? A. And my sons.

Q. Can you tell us how long you were there at that time?

A. Oh, I would stay over night lot of times, but I just——

Q. Now your brother was living there at that time? A. He was.

Q. He is married? A. He is.

Q. And was married then in 1949 when you were out there? A. Oh, yes.

Q. And had been married for many years before that? A. That is right.

Q. He has children of his own?

(Testimony of Clara Ocamica.)

A. He has. [32]

Q. They were living there with Henry Jr., and his wife and Henry Rubelt, your father?

A. Yes.

Q. Both your father and his son and his family lived there on the old home place; is that right?

A. That is right.

Q. Your brother owned the cattle out there, did he not? A. Yes.

Q. Your father didn't own any cattle?

A. I don't know whether he owned any or not.

Q. But your brother operated the cattle?

A. He did.

Q. And your father operated the ranch; is that right? A. Yes.

Q. And the cattle were run on the ranch?

A. Yes.

Q. And your father and your brother had an arrangement whereby your father got some of the proceeds of the cattle sales; isn't that right?

A. I don't know too much about his—his personal things.

Q. I see. Now your brother had bought a ranch up Juniper Mountain way? A. Yes.

Q. How far is that from the ranch of your father?

A. Oh, it is not too far when you go horseback.

Q. By the road how far is it? [33]

A. About forty miles.

Q. By horseback how far?



(Testimony of Clara Ocamica.)

A. Lot shorter, I wouldn't say.

Q. And when you were there in 1949 your brother was intending to move up to the ranch he bought; wasn't he?

A. I think so, I am not sure. I think so.

Q. You think he was?           A. Yes.

Q. Now he lived there, however, on the ranch, the home ranch where your father lived, the ranch involved in this action, until after Mr. Bybee made his transaction with your father; didn't he?

A. Yes.

Q. And after Mr. Bybee made the transaction your brother then moved up to his place at Juniper Mountain; is that right?           A. Yes.

Q. Is that right now?           A. Yes.

Q. When was this farm house on the ranch built, Mrs. Ocamica?

A. We didn't build it all at one time.

Q. It was built part at a time? It has been built over many years, hasn't it?           A. I think——

Q. Hasn't it been built for some years?

A. Just a minute, I can't think. In 1919 we finished it. [34]

Q. In 1919?           A. Yes.

Q. When did you start it?

A. Oh, we built on it a little every summer when we had time.

Q. I see. That house is not modern, is it?

A. It is not.

Q. Not modern, by that I mean there is no running water in the house?

(Testimony of Clara Ocamica.)

A. There was running water.

Q. What kind? From a well, is it?

A. Yes.

Q. When was the running water put in; do you know?

A. I don't think I was home at that time, but there was running water.

Q. Now was there a lavatory in the house, or was the toilet outside?

A. No, it was outside.

Q. Was there a bathtub in the house, or do you just use other means to take a bath?

A. I think we all do that.

Q. Out in the country? A. Yes.

Q. In other words, the house is not modern by the ideas that folks have now? A. No.

Q. The home where you live now is modern; isn't it? [35] A. No, it is not modern.

Q. It is not modern? A. No.

Q. Now, of course you knew that your father had that place for sale there quite a long time; didn't you? A. Yes.

Q. Wanted to sell it because your brother was moving his cow outfit up to the Juniper Mountain place?

A. He didn't want to sell it, he wanted to lease it.

Q. You knew he had it on the market for sale; didn't you?

A. I never seen the ad, I wouldn't know.

(Testimony of Clara Ocamica.)

Q. There was an ad put in the paper; wasn't there?

A. Someone told me there was, yes.

Q. Do you know what paper that was in?

A. No, I don't. I don't take the paper.

Q. And you knew your father had put a price on the ranch for the sale of it?

A. No, I didn't.

Q. You didn't know that?           A. No.

Q. But you did know he was eager to sell it?

A. When he wanted to lease it, that is all I know.

Q. That is all you knew about it?

A. Yes. [36]

Q. Now after he sold it, or made the transaction rather with Mr. Bybee, he continued to live out there, didn't he?           A. Yes, he did.

Q. He lived there through the summer, fall of 1950?           A. He did.

Q. Where did he live in the winter of 1950?

A. At my house.

Q. 1950 and 1951?           A. Yes.

Q. That was the first time he had ever lived at your house?           A. No.

Q. When did he live there prior to that time?

A. Since mother died he has been there almost every winter.

Q. Come in the winter and go back in the spring to the ranch?           A. Yes.

Q. And then in the summer of 1951—spring of 1951, he went back out to the ranch too, didn't he?

(Testimony of Clara Ocamica.)

A. Yes, the fall.

Q. Did he stay there for quite some time the second season?

A. Just in the fall, I believe.

Q. Just in the fall? Are you sure you are not confused about that?      A. Yes. [37]

Q. Now how long did he stay out there that year, the second year?

A. About three weeks.

Q. And at that time Mr. Bybee's employees were on the ranch out there; is that right?

A. That is right.

Q. And during the summer and fall of the year 1950 Mr. Bybee's employees were there at the ranch?      A. In 1950?

Q. Yes.      A. He was what?

Q. Mr. Bybee's workmen were there at the ranch, that is the people working for him?

A. There was one Indian there.

Q. Now your father looked after that ranch there, operated it for Mr. Bybee that first summer, didn't he?

A. He was there, I don't know what he did.

Q. You don't know?      A. No.

Q. Now, Mrs. Ocamica, you were present at the time the deposition was taken of your father starting at ten in the morning on Thursday, November 5th, 1953, at Mr. Greenfield's office, weren't you?

Mr. Greenfield: Object to the question. It is wholly immaterial.

(Testimony of Clara Ocamica.)

The Court: She may answer. [38]

A. I was.

Q. And at that time, Mrs. Ocamica, questions were asked your father and he gave the answers?

A. Not very correct.

Q. Well, he gave answers, didn't he?

A. Yes, he answered.

Q. And you heard all the questions and answers, didn't you? A. I did.

Q. And you say they were not correct?

A. No.

Q. All right, I show you this, being the deposition taken at that time at Mr. Greenfield's office, and I read to you from it:

Question: "What is your age now, Mr. Rubelt?"

Answer: "Eighty-five."

That's correct, isn't it?

A. It was.

Mr. Greenfield: May I make an objection?

The Court: Just a minute, we will take a brief recess.

After recess.

Mr. Greenfield: Mr. Anderson is willing to interrupt his cross examination until we get rid of this one witness. [39]

The Court: Very well.

EDWARD D. SAVARIA

called as a witness, being first duly sworn, testified as follows, upon

(Testimony of Edward D. Savaria.)

Direct Examination

Q. (By Mr. Greenfield): Will you state your name?      A. Edward D. Savaria.

Q. Where are you employed?

A. By the Bureau of Land Management.

Q. Here in Boise?      A. Yes, sir.

Q. What branch of it?

A. That is with the District Grazing Office.

Q. In this office do you have charge of the grazing permits for cattle ranches and sheep ranches in this area?      A. We do.

Q. Among the ranches over which you have jurisdiction is the old Henry Rubelt place down at Riddle one of them?      A. That is correct.

Q. Have you examined the records of your office and can you state the extent of the range right on this ranch?      A. Yes.

Mr. Anderson: Object on the ground it is not the best evidence. The record itself is the best evidence.

The Court: Well, he may answer.

Q. What was the range right?

A. The range right as shown in the record, 450 cattle from March 15th to September 30th; 300 cattle from October 1st to November 15th; 25 horses from March 16th to September 30th, and 25 horses from October 1st to March 15th, on this record here, of this succeeding year.

Q. How many animal unit months does that amount to?      A. 3214.

Q. Perhaps for the clarification for the record you might explain how you arrive at animal unit

(Testimony of Edward D. Savaria.)

months, starting with a animal unit? What is a animal unit?

A. Animal unit is defined as a thousand pound cow, or equivalent thereof—5 sheep, 5 goats, or under a new rule half a horse.

Q. What is a animal unit month?

A. A animal unit month is the amount of forage consumed by one animal as defined in one month.

Q. This range right you testified to has what is denominated as graze 1 right?

A. Graze 1 right.

#### Cross Examination

Q. (By Mr. Anderson): In other words, it is a right for 450 cattle and 25 horses? [41]

Q. That is what it is generally known as?

A. Yes, sir.

(The witness was excused.)

#### MRS. OCAMICA

returned to the stand for further cross examination.

Q. (By Mr. Anderson): I think I misspoke myself when I said this was at Mr. Greenfield's office, that deposition of your father was at my office, wasn't it?

A. That is right.

Q. Mr. Greenfield was there?

A. That is right.

Q. And you were there?

A. That is right.

Q. And your father was there?

(Testimony of Clara Ocamica.)

A. That is right.

Q. And I was there, right? A. Yes.

Q. And the court reporter was there?

A. I guess so.

Q. Well, you remember that, don't you?

A. (No answer.)

Q. Now I notice that your daughter is in the courtroom? A. She is.

Q. And I notice you are looking down at her before you answer and she nods; are you getting indications from her as to what your answer ought to be?

A. No, I am capable of answering my own questions.

Q. Let's go into this record here. Now, Mr. Rubelt remembered his age all right, didn't he? [43]

A. Well, anybody remembers their age.

Q. Now next, was this not his testimony:

Question—"And when is your birthday?"

Answer—"The 3d day of May."

A. That is right.

Q. That is correct, isn't it? A. Yes.

Q. Question—"How long have you lived out at Riddle?"

Answer—"Since 1900."

You don't know whether that is correct or not?

A. No.

Q. Question—"When did you come to this country here?" Answer—"Here?"

Question—"Yes."

Answer—"Well, I came in 1900, in October, I



(Testimony of Clara Ocamica.)

was the first time here in Idaho." Is that correct?

A. That is before my time.

Q. Did your father not so testify?

Mr. Greenfield: I would like to renew my objection to this line of cross examination on the ground it is improper cross examination, irrelevant and incompetent, and doesn't tend to prove or disprove any issues in this case.

The Court: Objection overruled. This witness testified her father didn't have a very good memory.

Q. Question—"How old were you when you came to Idaho?" Answer—"How old?"

Question—"Yes."

Answer—"Let's see,—thirty-two."

Did he not so testify? A. I guess so.

Q. Question—"And did you go directly to Riddle?"

Answer—"No, we bummed a while, before we located over there."

Question—"Where did you go when you first came to Idaho?"

Answer—"Not very far from there. We went up around Bruneau, further over towards the Three Creek country, around there. I don't know how if we was up any further than the Three Creek country. And then we went to Riddle, and I worked at Tuscarora, too."

Did your father not so testify?

A. Yes.

Q. His memory of that was all right?

(Testimony of Clara Ocamica.)

A. Yes.

Mr. Greenfield: I wish to have my objection as previously stated go to all these questions so I won't have to interrupt.

The Court: Very well, and the same ruling.

Q. I will continue with the deposition. [45]

Question—"Did you homestead the ranch out at Riddle?"      Answer—"Yes."

Question—"Is that the ranch you leased to Mr. Bybee?"      Answer—"Yes."

Question—"When did you homestead that?"

Answer—"It must have been 1901."

Question—"1901?"      Answer—"Yes."

Question—"How many acres did you homestead there?"      Answer—"160."

Question—"So you homesteaded there in 1901?"

Answer—"Yes."

Question—"And lived there from that time until you leased your place to Mr. Bybee?"

Answer—"Yes."

A. That is not right.

Q. He so testified, didn't he?

A. He testified, but it isn't true,—it is not correct.

Q. He did, did he not, live there?

A. He worked at the "Edgemont" mine for years.

Q. How long ago?

A. While I was a girl.

Q. Where was the mine?

A. My first school was at "Edgemont".

(Testimony of Clara Ocamica.)

Q. When did he homestead the place out there?

A. I wouldn't know. [46]

Q. Question—"How many acres did you lease to Mr. Bybee?"

Answer—"I don't exactly know, now; all that was there, of course."

Question—"All that you had?"

Answer—"Yes."

Question—"Mr. Rubelt, did you subsequently, up there, enter other public land, take up other public land, after you took up your first homestead?"

Answer—"Yes, I took a grazing——."

Question—"Grazing homestead?"

Answer—"Yes."

Question—"How many acres are in that?"

Answer—"640."

Did he not so testify?

A. Yes, he did.

Q. That is correct, isn't it?

A. Yes, I guess so.

Q. Question—"When did you take up that grazing homestead?"

Answer—"I don't remember, right now."

Question—"Approximately when?"

Answer—"What?"

Question—"About when?"

Answer—"I couldn't make that out."

Question—"Did you buy any land out there?"

Answer—"Yes, I bought the Weaver field." [47]

Q. That is correct, isn't it? A. Yes.

Q. His memory on that was all right, wasn't it?

(Testimony of Clara Ocamica.)

A. I guess so.

Q. Question—"And how large was that?"

Answer—"640."

Question—"And did you buy any other lands?"

Answer—"The Echechurri field."

That is correct?

A. I guess so.

Q. His memory was all right on that?

A. I don't know how much he bought.

Q. I will go back a little.

Question—"And did you buy any other lands?"

Answer—"The Echechurri field."

Question—"Who?"

Answer—"The Basque."

Question—"Raymond Echechurri?"

Answer—"Yes."

Question—"About when did you buy the field from Echechurri?"

Answer—"That is something I don't remember exactly, either.

Question—"About when was it?"

Answer—"No answer."

Question—"Did you have it for a long time before you leased it to Mr. Bybee?" [48]

Answer—"Oh, yes."

Question—"And you also had the Weaver field for a long time before you leased it to Mr. Bybee?"

Answer—"That was when them Basques had to get out of there with the sheep, wasn't it? Well, I can't make that out; I don't know."

Question—"How far is this ranch from Riddle?"

(Testimony of Clara Ocamica.)

Answer—"About seventeen miles, around the road."

Question—"That's the one road that you have to take to get there?"

Answer—"What?"

Question—"Is that the road that you have to take to get to the ranch?"

Answer—"Yes, you have to leave the highway there to get to my place—about seventeen miles."

Question—"Are there any other ranches adjacent or next to your ranch?"

Answer—"No."

Question—"How far is it to the next ranch out there?"

Answer—"I guess it's four miles—four or five miles. Mr. Sewell."

Question—"Is that Charlie Sewell?"

Answer—"Yes."

Question—"What is the name of that ranch? Is that the Flying H?" [49]

Answer—"Yes."

Question—"The Flying H ranch is closer to Riddle than your ranch?"

Answer—"What?"

Question—"The Flying H ranch is closer to Riddle than your ranch?"

Answer: "Yes, Riddle's there about two miles and a half, I think."

Question—"No, you are talking about the people, I think. Charlie Sewall's is closer to the place called Riddle than your ranch?"

(Testimony of Clara Ocamica.)

Answer—"Yes."

Question—"You had grazing rights with that ranch, didn't you?"

Answer—"Sure, it wouldn't be no good without."  
He so testified, didn't he?      A. Yes.

Q. His memory was all right there, wasn't it?

A. I guess so.

Q. Question—"No, that kind of a ranch is no good without grazing rights, is it?"

Answer—"No."

Question—"In other words, the ranch is used to put up hay for the cattle, and they range out on the public domain in the summer time?"

Answer—"Yes." [50]

Q. Question—"And you have some pasture in your fields, in the fall, do you not?"

Answer—"Yes."

Question—"How many cattle did you run out there?"

Answer—"Oh, it up and down, different years; sometimes we have thousand or more; and other times a few hundred; I guess steady there we have four or five or six hundred."

Question—"How many cattle did you have when you made the lease and option to Mr. Bybee?"

Answer—"I didn't have any."

Question—"When did you sell them?"

Answer—"I give them to Henry Rubelt, years ago."

(Testimony of Clara Ocamica.)

Question—"That's your son?"

Answer—"Yes."

Question—"And how long had it been since you had given the cattle to Henry?"

Answer—"Now?"

Question—"Yes?"

Answer—"Henry was eighteen years old. And how old is he? Forty-five?—or fifty?"

Did he not so testify?

A. I guess so.

Mr. Greenfield: Before you continue, may I add one objection to this. This deposition is a part of the record, apparently Mr. Anderson plans on reading it all. [51]

Mr. Anderson: I am cross-examining the witness.

Mr. Greenfield: I further object to it on the grounds it is a complete waste of time. It is in the record, and the Court has no doubt read the deposition.

The Court: Very well, but this is cross-examination, and she on being asked a question testified his answers were wrong. This is finding out what answers were wrong when the deposition was taken.

Q. (By Mr. Anderson): Question—"Henry had had the cattle ever since he was eighteen, then?"

Answer—"Yes."

Do you know whether or not that is correct?

A. I don't know anything about their personal things.

Q. Next question: Question—"And he had oper-

(Testimony of Clara Ocamica.)

ated and run the cattle ever since he was eighteen?"

Answer—"Uh, huh."

You don't know whether that is correct or not?

A. No.

Q. But do you remember your father so testifying? A. Yes. [52]

Q. Question—"And you hadn't run any cattle, yourself, since he was eighteen?"

Answer—"No."

Question—"And he is about forty-five years old now?" Answer—"Yes."

He so testified? A. Yes.

Q. You don't remember whether or not that is correct? A. He is not 45, and not 50.

Q. Your father so testified? A. Yes.

Q. How old is he? A. 49 this year.

Q. 49 this year? A. Yes.

Q. And your father said 45 to 50 in November, 1953, at the time this deposition was made?

A. I don't know.

Q. Well, at the time the deposition was taken?

A. Yes.

Q. That I am examining on? A. Yes.

Q. Question—"He has another cattle ranch out in Owyhee County?"

Answer—"Yes, out in Juniper Mountains."

Q. That is correct, isn't it? [53]

A. Yes.

Q. And your father so testified?

A. Yes.



(Testimony of Clara Ocamica.)

Q. Question—"That's on the ranch he got from the Brace Brothers?" Answer—"Yes."

Question—"How far are they from your place?"

Answer—"They call it about forty miles, I guess."

Your father so testified? A. Yes.

Q. That is correct, isn't it? A. I guess so.

Q. Well, did he so testify? A. Yes.

Q. Question—"Forty miles north of your place?"

Answer—"No, it's northwest—it's really west."

Question—"But they are in Owyhee County?"

Answer—"Yes."

Question—"How long has he had those ranches,—approximately?" Answer—"About ten years."

Question—"He bought them, then, from Brace Brothers, about ten years ago?"

Answer—"Yes."

That is correct, isn't it?

A. Yes, the deposition—I don't know when he bought it. [54]

Q. But your father so testified? A. Yes.

Q. Question—"He bought them, then, from Brace Brothers, about ten years ago?"

Answer—"Yes."

Question—"And he has been operating the cattle over there in connection with those ranches for quite a while?" Answer—"No."

Question—"For how long?"

Answer—"He leased them out; he leased them to Johnson, and Johnson re-leased them again to that——"

Question—"Smeed?"

(Testimony of Clara Ocamica.)

Answer—"Yes, Smeed; that's right; and that was, let's see,—that must been ten years ago, too."

Your father so testified, didn't he?

A. Yes, he did.

Q. That is correct, isn't it? A. Yes.

Q. His testimony is correct, isn't it?

A. Not all of it.

Q. That I just read to you here, is that right?

A. Yes.

Q. Question—"And Henry continued to live with you down on your ranch after he bought the Brace place?" Answer—"About five years."

Question—"And then he moved up on the Juniper Mountain place?" [55] Answer—"Yes."

Question—"That was after he got married?"

Answer—"No, he didn't move until after Bybee took the place over."

Question—"And he lived there on your place with his wife until Bybee took the place over?"

Answer—"Yes."

Question—"Did he operate the ranch while he was there, or did you?"

Answer—"He worked the cattle and I ran the ranch." Your father so testified, didn't he?

A. Yes.

Q. It is correct, isn't it? A. Yes.

Q. His testimony is correct, isn't it?

A. I don't know whether it is correct, I wasn't—

Q. You were out there?

A. I was out there, but you know I didn't see what they did every day.

(Testimony of Clara Ocamica.)

Q. You didn't pay any attention to that?

A. No.

Q. Let's stay with this:

Question—"You sold him the hay from the ranch, to feed the cattle?"

Answer—"No, when the deal—when we made the deal he said he would give me half the beef money."

"Question—"The agreement was that Henry give you half the beef money, and he would use the home place to run the cattle?"

Answer—"Yes."

Question—"And he did that?"

Answer—"Yes."

Your father so testified, didn't he?

A. Yes, but that wasn't true?

Q. What isn't true about it?

A. Because my brother wouldn't sell the beef some years, and he would sell the young stock.

Q. Did he give your father half the money from the young stock too?

A. I don't know that.

Q. You don't know?                      A. No.

Q. You don't know whether he gave your father half the beef money or half from all the sales or not?

A. No, I don't know anything about their personal affairs.

Q. Question—"You have reservoirs with that place, to irrigate with?"

Answer—"Yes, two of them."

Question—"Where are those reservoirs?"

(Testimony of Clara Ocamica.)

Answer—"North of the place."

Question—"North of it?"

Answer—"Yes." [57]

Q. Your father so testified, didn't he?

A. Yes.

Q. And that is correct, isn't it?

A. Yes.

Q. That is the testimony is correct, isn't it?

A. I don't know much about this business.

Q. Well, just answer according to the truth or as near as you recall it.

Question—"Did you build those yourself, Mr. Rubelt?"

Answer—"Yes."

Question—"With a scraper and team of horses?"

Answer—"Yes, one of them. The next one has ten thousand yard, I guess, in it, the second one, when we rented it out to get it fixed up—to contractors here."

Question—"That was some years ago?"

Answer—"Yes, oh, yes. Fifteen or sixteen years ago." Did your father so testify?

A. Yes.

Q. Is his testimony correct?

A. I don't know.

Q. Question—"Does all the water from the irrigation of your ranches come from those reservoir (sic)?"

Answer—"Yes. As soon as the snow is off, there is no more water come; it has to be used out of the reservoirs."

Question—"In other words, the reservoirs catch

(Testimony of Clara Ocamica.)

the spring runoff, and that's used to irrigate the place during the [58] summer?"

Answer—"Yes."

Question—"How large are those reservoirs?"

Answer—"One of them hold a thousand acres of feet, and the other one holds about five hundred acres of feet."

Question—"One of them holds a thousand acre feet, and the other one five hundred acre feet?"

Answer—"No, about twelve hundred, the other one."

Question—"Let me get it clear, now: Is it a thousand and twelve hundred, or twelve hundred and five hundred?"

Answer—"The first one I built hold a thousand acres of feet, and the second one a little over a thousand."

"Question—"Those reservoirs were built with dirt dams?"

Answer—"Yes."

Your father so testified, did he not?

A. Yes, he did.

Q. And his testimony is correct?

A. I don't know.

Q. You don't know whether it is or not?

A. I don't know what you mean.

Q. Did your father make any misstatements there as to the truth of those matters?

A. I don't know whether he had the right—what do you do when you tell how many feet it is?

Q. You mean you don't understand acre feet?

A. No.

(Testimony of Clara Ocamica.)

Q. We will not bother with that. [59]

Question—"When you were running the ranch, who did you hire to put up the hay out there?"

Answer—"Oh, Indians, sometimes, and sometimes a man or two from the outside."

Question—"Oh, I see. You could get Indians from the Reservation?"

Answer—"Yes."

Question—"How far is your ranch from the Reservation?"

Answer—"Five miles and a half—to the Reservation ranch."

Question—"To the Reservation ranch, but a little farther down to the Reservation buildings at Owyhee?"

Answer—"Yes, ten or fifteen miles down there."

Did your father not so testify?

A. Yes, but it isn't so.

Q. What is incorrect about it?

A. The mileage.

Q. How far is it?

A. It is 17 miles around to the highway. It must have been to the Owyhee a little further.

Q. I see. You don't know whether he was talking about the road or talking about the distance straight through, do you?

A. No, distance straight through is more.

Q. How far is it?      A. 20 or 30 miles. [60]

Q. Question—"What tribe of Indians lives at the Reservation?"

Answer—"Oh, most Piutes."

That is correct, isn't it?

(Testimony of Clara Ocamica.)

A. I don't know much about Piutes.

Q. You don't? A. No.

Q. But your father did so testify?

A. I don't think there is very many Piutes.

Q. Question—"Did Henry help put up the hay on the ranch when he was there?"

Answer—"Yes."

Question—"And you hired some men and some Indians to help?" Answer—"Yes."

Question—"Did Henry hire Indians for the cattle?" Answer—"Yes, once in a while."

Question—"He did most of the riding himself?"

Answer—"Yes."

Your father so testified, didn't he?

A. Yes.

Q. Is that testimony correct?

A. I don't know. You see, I don't know much about his riding and their cattle.

Q. You don't know whether it is correct or not?

A. No, I don't. [61]

Q. Question—"At the time you made the deal with Mr. Bybee to lease and sell that place, Henry was contemplating going up to his Juniper Mountain Place?"

Answer—"Yes, his time was up; he had to take them over."

Question—"Of course you had been trying to sell your ranch for quite a while, out there, hadn't you?"

Answer—"Yes. Of course, while Henry was there I didn't try to sell it; I didn't want to run him off."

(Testimony of Clara Ocamica.)

Question—"But when Henry was going to have to move, you decided to sell it?"

Answer—"He didn't want to. So I had to do something." Did your father not so testify?

A. Yes, but that wasn't so, I wrote the letters that he wanted to lease them.

Q. Was it true with respect to what he said about Henry? A. I don't know.

Q. You don't know? A. No.

Q. You say your father didn't want to sell, but he did testify he did want to, didn't he?

A. He wanted to lease it.

Q. The next question:

Question—"Did you offer to sell to Earl Riddle?"

Answer—"Yes, I did, once, but he didn't want it."

So your father did offer to sell; is that correct?

A. I don't know for sure, I don't know.

Q. Question—"Earl Riddle has his ranch out near the place called Riddle?"

Answer—"He is quite a ways from there."

Question—"How far is Riddle from Earl Riddle's ranch?"

Answer—"Earl Riddle and his boys, they just have one place there."

Question—"How far is that from your ranch?"

Answer—"Seventeen miles, eighteen, around the road; I guess straight through, it is closer."

Question—"How much did you offer to sell your ranch to Earl Riddle for?"

Answer—"Forty thousand."

Your father so testified, didn't he?



(Testimony of Clara Ocamica.)

A. Yes.

Q. Is that testimony correct?

A. I don't know whether he tried to sell it, I don't know.

Q. Next question: Question—"And he didn't want it?" Answer—"No."

Question—"Did you offer to sell it to a man in Twin Falls, that you recall?"

Answer—"Yes."

Question—"Who was that?"

Answer—"Oh, the sheep man; I don't know, I couldn't make out the name." [63]

I will continue:

Q. Question—"A Basque?"

Answer—"No, it was a white man—a sheep man."

Question—"That was about the time you made the deal with Bybee?"

Answer—"No, that was before."

Question—"That was before?"

Answer—"Yes."

Question—"How long before?"

Answer—"That fellow was over there in the winter; it must have been around two months or three months, I don't know."

Question—"What did you offer to sell the ranch to him for?" Answer—"Fifty thousand."

Question—"But he didn't want it?"

Answer—"Well, he wanted it, but he had sheep."

Question—"Oh, I see; and he couldn't run sheep there?" Answer—"No."

Did not your father so testify?

(Testimony of Clara Ocamica.)

A. Yes.

Q. Is his testimony correct?

A. You mean is that?

Q. Yes.           A. I don't know.

Q. You don't know?

A. I don't know whether he tried to sell it. I don't know. I wrote the letters and he wanted to lease it. [64]

Q. Question—"Mrs. Eustaquia Ocamica is your daughter?"           Answer—"Yes."

Question—"And she is here now?"

Answer—"Yes."

Question—"And Henry Rubelt is your son."

Answer—"Yes."

Question—"Those are the only children you have?"           Answer—"Yes."

Question—"Mrs. Rubelt passed away some years ago?"           Answer—"Yes, '39."

Did your father not so testify?           A. Yes.

Q. And is his testimony correct?           A. Yes.

Q. Question—"1939?"

Answer—"Yes."

Question—"Mrs. Rubelt, your wife, and yourself were living at the ranch at the time she passed away?"           Answer—"No, Mountain Home."

Question—"Oh, did you take her to Mountain Home because she was ill?"

Answer—"To see the doctor."

Question—"How long was she there?"

Answer—"Oh, a month."

(Testimony of Clara Ocamica.)

Question—"Did you stay at Mountain Home during that time?" [65]      Answer—"Yes."

Did your father not so testify?      A. Yes.

Q. Is his testimony correct?

A. I guess so, I don't know. I don't know much about this.

Q. Question—"You know Mr. Hall, Perce Hall, the lawyer over there quite well?"

Answer—"Oh, yes—not quite well. I know him now."

Question—"He probated Mrs. Rubelt's estate, that it, he was your attorney in the probate of her estate?"      Answer—"There was no estate."

Question—"Well, you had a probate proceeding in court, and you had Mr. Hall take care of that?"

Answer—"I don't know; I don't remember that."

Question—"And he has done other business for you from time to time, has he?"

Answer—"When we get the reservoir out to a contractor, the second one, to put it in shape, he was the attorney. And I made a will with him, too. That will is still there with Mr. Hall."

Question—"Mr. Hall made your will?"

Answer—"Yes."

Question—"That was before you made your deal with Mr. Bybee?"      Answer—"Yes." [66]

Question—"And Mr. Hall made the contract——?"

Answer—"Yes."

Question—"——for the construction of the second reservoir?"      Answer—"Yes."

(Testimony of Clara Ocamica.)

Question—"And that was before your deal with Mr. Bybee."      Answer—"Yes."

Question—"And you went to Mr. Hall to get the property straightened out, at the time Mrs. Rubelt died?"      Answer—"Uh, huh."

Question—"So you know Mr. Hall fairly well?"  
Answer—"No."

Question—"He had been your attorney, though, for quite some time?"      Answer—"Yes."

Question—"Before you made your deal with Mr. Bybee?"      Answer—"Yes."

Question—"And when you had any legal work done, you usually went in to see him at Mountain Home?"

Answer—"That was all I had to do with him."

Question—"I see."

Answer—"I didn't see him any other time, except just when I had something to do with him."

Did your father not so testify?

A. But it is not correct.

Q. Where is it incorrect?

A. Read that part over. [67]

Q. This last question I just read?

A. Yes.

Q. Question—"You know Mr. Hall, Perce Hall, the lawyer over there, quite well?"

Answer—"Oh, yes,—not quite well. I know him now."

Question—"He probated Mrs. Rubelt's estate, that is, he was your attorney in the probate of her estate?"      Answer—"There was no estate."

(Testimony of Clara Ocamica.)

Is that correct?           A. I don't know.

Q. Question—"Well, you had a probate proceeding in court, and you had Mr. Hall take care of that?"

Answer—"I don't know, I don't remember that."  
Do you know whether or not that is correct?

A. I don't know.

Q. Question—"And he has done other business for you from time to time, has he?"

Answer—"When we get the reservoir out to a contractor, the second one, to put it in shape, he was the attorney. And I made a will with him, too. That will is still there with Mr. Hall."

A. Did he get a will there?

Q. Is it correct?

A. I don't know. Gene Anderson made the will.

Q. That was many years ago. Do you know whether or not Mr. Hall made a will for Mr. Rubelt?

A. I don't know whether he did or not. I know Mr. Anderson made a will in 1935; is that correct?

Q. That is correct. Do you know whether or not Mr. Hall made one or not subsequently?

A. No.

Q. Question—"Mr. Hall made your will?"

Answer—"Yes."

Question—"That was before you made your deal with Mr. Bybee?"           Answer—"Yes."

Is that correct?           A. I don't know.

Q. Question—"And Mr. Hall made the contract——?"           Answer—"Yes."

(Testimony of Clara Ocamica.)

Question—"——for the construction of the second reservoir?" A. Answer—"Yes."

Is that correct? A. I don't know.

Q. And the next question: Question—"And that was before your deal with Mr. Bybee?"

Answer—"Yes."

Is that correct? A. I don't know.

Q. Question—"And you went to Mr. Hall to get the property [69] straightened out, at the time Mrs. Rubelt died?" Answer—"Uh, huh."

Is that correct? A. I don't know.

Q. Question—"So you know Mr. Hall fairly well?" Answer—"No."

Is that correct?

A. I don't know that either.

Q. Question — "He had been your attorney, though, for quite some time?"

Answer—"Yes."

Is that correct? A. I don't know.

Q. Question—"Before you made your deal with Mr. Bybee?" Answer—"Yes."

Is that correct? A. Is what correct?

Q. The statement that he had Mr. Hall as attorney for quite some time before the deal with Mr. Bybee and he answered "yes"; is that correct?

A. He was Bybee's and Mr. Rubelt's lawyer.

Q. You don't know anything about that, do you?

A. No.

Q. You don't know whether Mr. Hall ever saw Mr. Bybee before he came in the office with your father that day, do you? A. No. [70]

(Testimony of Clara Ocamica.)

Q. Question—"And when you had any legal work done, you usually went in to see him at Mountain Home?"

Answer—"That was all I had to do with him."

Question—"I see."

Answer—"I didn't see him any other time, except just when I had something to do with him."

Is that correct?            A. I don't know.

Q. Your father so testified, didn't he?

A. Yes, but I don't know whether it is correct or not.

Q. Question—"You remember, of course, the day Mr. Bybee came out to see you?"

Answer—"The date?"

Question—"The day. You don't remember the date, of course, but you remember when he came there?"            Answer—"Oh, yes."

Question—"You were there at home?"

Answer—"Yes."

Question—"And your daughter-in-law, Mrs. Henry Rubelt, was there?"

Answer—"Oh, yes, all of them."

Question—"With her youngsters. Was Henry there that day, do you know?"

Answer—"Uh, huh."

Did your father so testify?

A. Yes, but I don't know whether it is correct.

Q. You don't know whether that is correct or not?            A. No.

Q. Question—"And what was the conversation you had with Mr. Bybee that day?"

(Testimony of Clara Ocamica.)

Answer—"Well, he wanted to see the place, and I went with him,—showed him the reservoirs and all."

Question—"Took him over the place?"

Answer—"Yes."

Question—"You wanted to sell it to him?"

Answer—"Uh, huh."

Question—"And you knew he wanted to buy it?"

Answer—"Yes."

Question—"And did you discuss a deal that day?"

Answer—"Yes."

Did your father not so testify?           A. Yes.

Q. Is it correct?           A. I don't know.

The Court: We will recess until two o'clock.

After recess, 2:00 p.m.

The Court: You may proceed.

Q. (By Mr. Anderson): Now I again show you the transcript of the testimony of Mr. Henry Rubelt, the plaintiff here, at the time of the deposition and show it to you and read you from the deposition. [72]

Question—"And did you discuss a deal that day?"

Answer—"Yes."

Question—"What was the discussion that day?"

Answer—"Oh, most of the discussion was promises by Mr. Bybee done. In the first place, I said I would like to stay on the place, and he said, 'Oh, yes, you stay on the place, you work here,' and he said that 'You stay on the place, even if you can't work any more.' And so it didn't look like I couldn't work and stay there, so I say, 'If I stay in the win-



(Testimony of Clara Ocamica.)

ter here, if I happen to stay in the winter here and don't work, I pay that tax.' So I did, and he said I will."

Question—"Do you remember the time he came out and you went to Mountain Home?"

Answer—"Not exactly."

Question—"You remember going to see Mr. Hall to have the contract made, don't you?"

Answer—"Yes. That must have been around the 10th."

Question—"Tenth of what month?"

Answer—"What is it? March? It must have been."

Question—"And Mr. Bybee and you went in at that time and talked to Mr. Hall?"

Answer—"Yes."

Now did Mr. Rubelt so testify at that deposition?

A. I guess so.

Q. You were there? A. Yes. [73]

Q. And are his answers there correct?

A. You mean if I know it was correct?

Q. Yes. Do you know whether or not it was correct? A. No, I wasn't there.

Q. Question—"Was there anybody else went with you?"

Answer—"No. I thought Mr. Hall was my lawyer, and if anything was wrong he would point it out to me."

Question—"You thought Mr. Hall was your lawyer?" Answer—"Yes."

(Testimony of Clara Ocamica.)

Question—"And that's the reason you went to Mr. Hall?"

Answer—"Yes."

Question—"And you talked to him about the kind of a deal you had made."

Answer—"He didn't talk loud enough; I couldn't understand lots of things."

Question—"I see. Is your hearing pretty good?"

Answer—"Not very good."

Question—"And how about your eyesight?"

Answer—"Not very good."

Question—"But you hear me all right?"

Answer—"Yes."

Question—"You think I talk louder than Mr. Hall?"

Answer—"That's right."

Question—"But my tone of voice is not a loud tone of voice?"

Answer—"What is that?" [74]

Question—"But my tone of voice is not a loud tone of voice?"

Answer—"No, it is all right."

Did you hear Mr. Rubelt so testify?

A. Yes.

Q. Are his answers there correct?

A. Well, he could hear.

Q. Well, are his answers here correct? You heard me sitting across the table from him at the time of this deposition?

A. Yes.

Q. He didn't use a hearing aid that day?

A. No, but you talk different than anybody else.

Q. I talk louder?

(Testimony of Clara Ocamica.)

A. There isn't another man that I ever saw that can talk like you can.

Q. Now Mrs. Ocamica, you get me all excited here. A. How could I?

Q. Mrs. Ocamica, we were all in the office at the time this deposition was taken, weren't we?

A. Yes.

Q. And Mr. Rubelt was sitting there without a hearing aid; is that right? A. Yes.

Q. And I was talking in a lot louder tone of voice than I talk now? A. No. [75]

Q. What is your impression of this, about the same as I talk now?

A. Yes, but you can even make "Stackey" understand.

Q. That is your husband? A. Yes.

Q. Well, I always thought I could. But Mr. Rubelt heard all right at the time of this deposition, didn't he?

A. He heard you, yes, you have a nice voice to make you hear, yes.

Q. Now, continuing with the deposition, and I read to you:

Question—"Now you then went in to see Mr. Hall; you took Mr. Bybee there?"

Answer—"He went with me, yes; sure, he brought me there."

Question—"But you told him what lawyer to go to?" Answer—"Yes."

Question—"Because Mr. Hall was your lawyer?"

Answer—"Yes."

(Testimony of Clara Ocamica.)

Question—"And you went in to see Mr. Hall together?"      Answer—"Yes."

Question—"And while you were there you told Mr. Hall the kind of a deal you had made with Mr. Bybee?"

Answer—"I don't know if we told everything; I don't think so."

Question—"Well, you talked to him about the deal, didn't you?" [76]

Answer—"Yes, but I didn't have the papers, and Mr. Hall had to go to Murphy to get it fixed up."

Question—"That's to get the description of the land?"      Answer—"Yes."

Question—"And when you left Mr. Hall's office, where did you go?"

Answer—"That was late in the afternoon, so he took me and went to Nyssa that night, and stayed down there a couple of days; and I don't know if he got notice from Hall, but he took me to Mountain Home, and he dropped me in front of Mr. Hall's and he said to me, 'I have to hunt for my brother,' and pretty soon he come back."

Now did Mr. Rubelt so testify at the time of this deposition?

A. I don't think he knew where he went, did he?

Q. Well, did he testify. Were questions and answers given as I have read them here at the time?

A. Yes, I guess so.

Q. You were there, weren't you?

A. Yes, but——

(Testimony of Clara Ocamica.)

Q. Is that correct? Are the answers correct, or do you know?

A. He never knew where he went.

Q. You mean he never knew where he went from Mr. Hall's office?      A. No.

Q. Where did he go?

A. I went to all the hotels and checked on them, and finally I went to Mr. Hall and I said to Mr. Hall, "Where did [77] Bybee go?" and he said, "Bybee took him to Nyssa."

Q. He testified he went to Nyssa?

A. Yes, I guess we talked it over but he didn't know.

Q. He didn't know when he talked to you but he knew at the time of the deposition?

A. Yes, I guess we checked on it by that time.

Q. Question—"And did you go back and talk to Mr. Hall?"

Answer—"No, he was busy; he had people waiting on."

Question—"You knew the girl he had there in the office, his secretary?"

Answer—"Yes."

Question—"She had lived out at Owyhee, Nevada, or Mountain City?"

Answer—"Was she in the office then? That was quite a while ago; maybe she was there. Yes, I know her husband."

Question—"When you went in with Mr. Bybee to see Mr. Hall the first time, you told Mr. Hall the

(Testimony of Clara Ocamica.)

kind of a deal you had made with Mr. Bybee, didn't you?"

Answer—"No, I don't know if we did. I guess we discussed it the second time we got in the office."

Question—"Oh, you discussed it then?"

Answer—"Yes."

Question—"With Mr. Hall?"

Answer—"Yes, he was there." [78]

Question—"And you told him the kind of a deal you had made?"

Answer—"Yes."

Question—"And you told him what to put in those papers?"

Answer—"Uh, huh. Oh, the papers was made."

Question—"Well, when did you tell him what to put in the papers?"

Answer—"Was it the first time we seen him? I don't think we say much."

Question—"But do you recall telling him at that time what to put in the papers? He couldn't draw papers unless you told him, could he?"

Answer—"Not much; I think the most of it was discussed when he made out them papers, the second time. And I tell Mr. Hall if he can't pay, I take the ranch back—I didn't know anything then about that stuff out of the sales yard. He told me he going to run cows and calves. And I says to Mr. Hall—Bybee was there—if he can't make me the payments, I take the ranch back. I didn't know

(Testimony of Clara Ocamica.)

nothing about that other that showed up. So we made that discussion the same day."

Q. Do you recall whether or not Mr. Rubelt so testified at the time of this deposition?

A. I guess he did, I don't remember.

Q. Well, his answers are correct so far as you know, or do you know?      A. I don't know. [79]

Q. I read to you from the deposition: Question—"You thought maybe Mr. Bybee couldn't make it on the ranch?"

Answer—"Well, he belly-ached always he didn't have this and he didn't have that, and he didn't have that, and finally I thought I will take it back."

Q. Do you remember that question and answer?

A. No.

Q. You don't remember that at the time of the deposition?      A. No.

Q. Do you know whether or not the answers are incorrect?

Mr. Greenfield: Your Honor, I appreciate perhaps Mr. Anderson is entitled to discover what part of this deposition Mrs. Ocamica feels Mr. Rubelt was mistaken. I don't think there is any point to his continuing to ask her if the reporter transcribed it correctly. We will concede Mr. Rubelt testified at the time of the deposition everything that is written down here, but constantly asking Mrs. Ocamica if he so testified—we will concede that.

Mr. Anderson: You concede that all that is being read from this deposition is correct?

(Testimony of Clara Ocamica.)

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(Testimony of Clara Ocamica.)

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Mr. Anderson: You concede that all that is being read from this deposition is correct?

(Testimony of Clara Ocamica.)

Mr. Greenfield: I concede the reporter reported the answers of Mr. Rubelt correctly.

Mr. Anderson: Very well.

Q. (By Mr. Anderson): And I read from the deposition: [80]

Question—"That was the first time you went in?"

Answer—"No, second time."

Question—"The second time you went in?"

Answer—"Uh, huh. I didn't know nothing about that auction, what it is and how it works, till it was too late."

Question—"But you knew you had made a deal to lease and sell the place to Mr. Bybee?"

Answer: "Yes. He says, himself, 'If the time is up' and he wants it, could he buy it, and I says, 'Yes, if you pay for it enough, you can buy it'."

Question—"And the price you put on it was \$3,000.00 a year?"

Answer—"Yes."

Question: "And you were to have the right to live out there?"

Answer—"That's what Mr. Bybee promised me, that I have the right to stay on the ranch as long as I wanted to."

Question—"Did you stay on the ranch for a while?"

Answer—"The first year."

Question—"Why did you move?"

Answer—"He had a hired boss there who told me to move. He said, 'You made that road, go on.' And then he told me several times to move soon."

(Testimony of Clara Ocamica.)

Question—"That was the man who was boss out there?"      Answer—"Yes."

Question—"What was that man's name?"

Answer—"Oh, I don't know, either; I don't know; I never [81] asked him what his name was."

Question—"Did you ever talk to Mr. Bybee about going out there?"      Answer—"Yes."

Question—"When was that?"

Answer—"The next year. But I had a letter he don't want me up there, so I have to stay home."

Question—"Who wrote the letter? Mr. Bybee?"

Answer—"The handwriting don't look like a man's handwriting; I think Mrs. Bybee wrote that letter. He said he want to save expenses, he don't want me up there."

Question—"Well, you stopped at his place, afterwards, down at Grandview?"

Answer—"We stopped there when we drove through, I think."

Question—"But did you live down at Grandview?"      Answer—"No."

Question—"You have been living with Mr. and Mrs. Ocamica at Bruneau?"

Answer—"Yes."

Question—"That is your daughter and son-in-law?"      Answer—"Yes."

Mr. Greenfield: For the purpose of the record in this case, I think it ought to be made very clear to Mrs. Ocamica that when Mr. Anderson asks if those answers are correct, he is talking about whether or not she knows personally as to the truth

(Testimony of Clara Ocamica.)

of the answers. I think she is saying, "I guess so," and at least part of the time with the idea that is what Mr. [82] Rubelt said at the time he testified.

The Witness: Yes, that is right.

Mr. Greenfield: Now Mr. Anderson is asking you whether or not these answers are true, that is the thing you ought to have in your mind, and if you don't know say so.

Q. (By Mr. Anderson): That is what I mean, were—whether or not you know if the answers are true?

A. Well, you see, I don't know. I was there at the deposition and you have it down, and you ask me and I don't know. I wasn't with my dad, he was all by himself.

Q. Then some of the times you knew they were correct, and sometimes you don't know?

A. I don't know anything at this point.

Q. Then, Mrs. Ocamica, if I am going too fast you slow me down here, and we will take it easy. I don't want you to be at all confused. Now going back to the question:

"Question—"You have been living with Mr. and Mrs. Ocamica at Bruneau?"

Answer—"Yes."

Question—"That's your daughter and son-in-law?"

Answer—"Yes."

Question—"That's ever since you left the ranch at Riddle?"

Answer—"Yes."

Now do you know whether or not those answers are correct?

A. He lives with me, yes. [83]

(Testimony of Clara Ocamica.)

Q. Question—"Do you help there on the ranch, with stacking?"

Answer—"Yes, whatever I could do. He kept me there for room and board."

That is with reference to the living at your place. Do you know whether or not those answers are correct?

A. No, I don't. He lives with us and that is all I know.

Q. He helps around the place, doesn't he?

A. Yes, a little. He works around there a little.

Q. Question—"Do you work there?"

Answer—"Yes."

Question—"What do you do, Mr. Rubelt. I am interested." Answer—"Most anything."

Question—"Mr. Rubelt, I think you are a rather remarkable man for your age. Are you able to get out in the fields yet?" Answer—"Yes."

The Witness: He don't now.

Q. He doesn't now but he did back when he first came to your place in 1951 or 1952?

A. No, he was sick in 1949 and 1950. He is lots better than he was, and he is asleep here now.

Q. He is here in the courtroom now?

A. Yes.

Q. That is the old gentleman sitting back there?

A. Yes, sir.

Q. I read to you from the deposition:

Question—"Do you do the chores around the place?" Answer—"Some of it." [84]

Question—"Do you stay pretty busy?"

(Testimony of Clara Ocamica.)

Answer—"Why, yes. There's always something to do on the ranch."

Are those answers correct?

A. My dad even sleeps in a heated room.

Q. I will read from the deposition:

Question—"And do you take care of your own business?"

Answer—"No, I can't see no more and I can't hear no more."

Question—"Do you write your own checks?"

Answer—"No. No, I sign them."

A. My father don't read nor write.

Q. Those answers are correct then?

A. Only thing he can do is write his name in United States—he can write in German but not United States, and he always had a German paper.

Q. But he does sign his name?

A. Yes, and he can't see the dotted line. He writes all over the check.

Q. Question—"Who do you have make your checks now?"

Answer—"Anybody I buy anything. My daughter, mostly."

Question—"You take care of your own bank account now?"

Answer—"So far as I can see."

Question—"You keep your bank account at Bruneau?"

Answer—"No, Mountain Home."

Are those answers correct?

A. Yes, he keeps his account at Mountain Home, there is no bank at Bruneau. [85]

(Testimony of Clara Ocamica.)

Q. Well, there was at the time of the deposition, wasn't there?      A. Yes.

Q. There was back at the time of the transaction? That is the transaction involved in this case, wasn't there?

A. Yes, they bank in Mountain Home.

Q. Question—"In the First Security Bank there?"

Answer—"Yes, ever since I have any money in the bank that's at Mountain Home."

Question—"That for many years?"

Answer—"Yes."

Question—"Do you visit at Mountain Home very often?"

Answer—"Not when I don't really have to go down, I don't go down."

Are those answers correct?      A. Yes.

Q. Question—"You just go over there on business?"      Answer—"Yes."

Question—"How often do you think you go over there?"

Answer—"That isn't very often."

Are those answers correct?

A. I don't know what to say. He goes over there, he takes off every once in a while and goes.

Q. Question—"You don't do any business in the bank at Bruneau?"      Answer—"No." [86]

Question—"Never have?"

Answer—"Never have—yes, I did, but I got—well, it's all right."

Question—"When was that?"

(Testimony of Clara Ocamica.)

Answer—"When that—what was his name what got in the pen in Bruneau?"

"Mr. Ocamica: Reynolds?"

"The Witness: In Bruneau. No, the other banker."

Then a question by me:

Question—"Golden?"

Answer—"Golden; you got it. I had a thousand dollars, and I didn't want to take the thousand dollars home with me, so I run in the Bruneau bank and I said, 'Here, put that in here,' and I said, 'How much interest you pay?' And he say four percent, and so I put it in the Bruneau bank. Years went by, so I thought I will go in and see about it, and he says is \$60.00, but there is no saving account in Bruneau, and that money didn't draw any interest."

Question—"It was just in your checking account?"

Answer—"Yes. So I took out the thousand dollars. So I didn't have no business with him no more." Are those answers correct?

A. I don't know.

Q. Question—"How long ago was that?"

Answer—"Oh, I guess ten or fifteen years, I guess. Golden." [87]

Q. "Now, what is your grandson's name, Ashby,—your grandson's name?"

Answer — "Oh, my nephew; that's Raymond Ashby."

Question—"He is your grandson?"



(Testimony of Clara Ocamica.)

Answer—"Yes."

Question—"He's in the army?"

Answer—"Yes."

Question—"He would like to have this place of yours?"

Answer—"He would like to work it with me. He says, 'Grandpa, if you get the place, I will help you fix it up again'."

Question—"And you and he will work the place together."

Answer—"Oh, sure, if we get it."

Question—"And this process of getting the place back for you is his idea?"

Answer—"Well, when I found out that this thing was wrong, I thought I would work it that way, and finally he showed up and says, 'I will help you'."

Question—"When did you find out it was wrong?"

Answer—"Oh, right away, so soon I came out and spoke about it to some of the fellows, he laughed about the deal I made."

Question—"That was right after you signed the papers?"

Answer—"Yes."

Question—"How soon after? Two or three days?"

Answer—"Everybody talking and laughing about it, right after—no, it was the next Sunday; no, it was the next week."

Question—"And who laughed about it?" [88]

Answer—"Oh, I don't know; everybody that was around there."

Question—"Around where? At Mountain Home?"

(Testimony of Clara Ocamica.)

Answer—"Yes, sure. I found out about that whole thing, then I heard lots of them afterwards, 'Why didn't you tell me. I took the place. I took the place'."

Question—"Did Riddle tell you that?"

Answer—"No, Riddle wasn't there; he was home. Riddle didn't want it."

Question—"I see. Who told you they would take it on the same deal?"

Answer—"I forgot about them; there was too many of them; it was in the Pastime they talked about it."

Question—"That's over at Bruneau, or Mountain Home?"

Answer—"Mountain Home."

Question—"You stayed in Mountain Home, then, for a few days after you signed the papers?"

Answer—"No, went back to Nyssa."

Question—"No, but did you stay in Mountain Home for a few days after you signed the papers?"

Answer—"No."

Question—"Where did you go?"

Answer—"I didn't go no place; I couldn't drive a car. I think Bybee took me."

Question—"He took you to Nyssa?"

Answer—"I think so." [89]

Question—"How long did you stay in Nyssa?"

Answer—"Few days."

Question—"And then you went back down to the ranch?"

Answer—"Yes."

Question—"And then you lived there for the rest of that year?"

(Testimony of Clara Ocamica.)

Answer—"Rest of that year, yes."

Question—"How much hay does that ranch produce every year, Mr. Rubelt?"

Answer—"Oh, four or five hundred ton, six hundred ton; some years it's over and some years it's down."

Question—"Hay is the main crop there?"

Answer—"Yes, and some years grain, too."

Question—"What kind of hay do you raise out there? Wild hay?"

Answer—"Timothy, and clover, and wild."

Question—"And you stack it out there, and feed it to the cattle in the winter time?"

Answer—"Yes."

Is this bothering you?

A. It is killing me.

Q. It is quite warm in here?           A. Yes.

Q. Are those answers correct or do you know?

A. I would like a drink of water.

(Witness was given a glass of water.) [90]

The Court: I think for the purpose of interrogation what you are trying to find out is whether what part of this is incorrect—what part of the testimony is incorrect. It would be better if you stayed back a little.

Q. Do you remember the last answers that I read here just before you asked for a drink of water?

A. I don't know whether I do or not now.

Q. Well, let's continue with the deposition:

(Testimony of Clara Ocamica.)

Question—"And you stack it out there, and feed it to the cattle in the winter time?"

Answer—"Yes."

Question—"You have a lot of winter out there?"

Answer—"Oh, just like other places; it isn't any worse there."

Question—"Do you think it gets as cold at Bruneau as it does out there?"

Answer—"Yes, but Bruneau ain't got the snow we got."

Question—"How much snow do you have out there at the ranch?"

Answer—"It's up and down; sometimes there isn't hardly any, and other times there is lots of it."

Question—"About how deep is it out there at the ranch?"

Answer—"The last fifteen years, about three feet, I guess, on the average."

Question—"Does it drift pretty badly out there?"

Answer—"Over the rim rocks, yes." [91]

Question—"Do you have a lot of wind out there, in the winter time?"

Answer—"Plenty."

Question—"As a matter of fact, there is lots of wind out there, winter and summer, isn't there?"

Answer—"Yes, plenty of wind there."

Are those answers correct?

A. Yes, the wind blows out there.

Q. And quite a lot of snow out there?

A. Just like anywhere else.

Q. Question — "Do you remember when the

(Testimony of Clara Ocamica.)

change was made in this contract, in Mr. Hall's office?"

Answer—"No, not exactly."

Question—"Well, you remember going in with Mr. Bybee and having the option changed so that he could exercise it sooner?"

Answer—"Yes."

Question—"You were together at that time?"

Answer—"How?"

Question—"Mr. Bybee and you were together at that time, were you?"

Answer—"Oh, yes. Yes."

Question—"And you both talked to Mr. Hall about having that change made?"

Answer—"Yes, Bybee wanted it."

Question—"That was quite a while after the contract was first made, wasn't it?" [92]

Answer—"Yes, quite a while."

Question—"How long? Three years?"

Answer—"Yes, it must have been two or three years."

Question—"Mr. Bybee had been paying you the rent during all that time?"

Answer—"No, up and down he was; he shipped out the cattle——"

Question—"I don't think you understand. He paid you the rent every year?"

Answer—"Yes."

Those answers are correct, aren't they?

A. If you have got them written down, I guess so.

Q. I mean correct so far as the truth of them

(Testimony of Clara Ocamica.)

is concerned, as to whether or not the answers are correct?

A. I wasn't there. I really don't know, I wasn't with papa. There was nobody with him.

Q. Question—"And you took the rent until the last rent payment?" Answer—"Yes."

Question—"And you declined to take the last rent payment?" Answer—"Yes."

Question—"And he left the rent for you at Mr. Hall's office?" Answer—"Yes."

A. No, he didn't—one night he came way in the night and left a payment. We was all in bed, and he come way in the night and left a payment. Nobody heard it 'cept the hired man [93] heard that a man was there.

Q. He left a check? A. Yes.

Q. For the rent? A. Yes.

Q. And you don't think any was left at Mr. Hall's office?

A. I don't know. I know this one time he came and left way in the night.

Q. That was one of the rent installments?

A. Yes.

Q. Question—"Did you talk to Mr. Hall about it?"

Answer—"No, I didn't like it; the way Mr. Hall deal with me, I didn't talk to him any more."

Question—"But you felt friendly to Mr. Hall to the time you had the change made in the contract?"

Answer—"Yes."

Question—"Do you remember when Mr. Bybee

(Testimony of Clara Ocamica.)

came to you and wanted the right to sublease the ranch?"

Answer—"No. That must have been two — two years ago,—three years ago."

Question—"He came to you and wanted to sublease it?"      Answer—"Yes."

Question—"And you talked to Mr. Hall about it?"

Answer—"Yes, he was in the office; he took me over there."

Question—"And did Mr. Hall advise you against doing that?" [94]

Answer—"No, he never said nothing."

Question—"You decided not to let him sublease it?"

Answer—"No, that was in the contract, and my son, Henry, had trouble with his ranch, with Smeed, so I had enough of it."

Question—"You decided you didn't want Bybee subleasing it?"

Answer—"No, if I took the ranch back I could find out that they had burned up the fences, and everything."

Question—"That was over on Henry's ranch where that happened?"

Answer—"Yes. I didn't want it home; I had enough of it."

Question—"So that was the reason you decided not to let him sublease your ranch?"

Answer—"No, I knew the trouble Henry had."

Question—"The trouble Henry had on his ranch on Juniper Mountain?"      Answer—"Yes."

(Testimony of Clara Ocamica.)

Question—"When Mr. Bybee came out to see you and told you he was interested in buying, you told him you wanted forty thousand for it?"

Answer—"Yes, but he say he don't have; and if he don't have, he don't have, so I just dropped it. And he wanted thirty thousand, and was all ready to get out, and he finally hollered, "No, I will take it."

Question—"He said he would take it?" [95]

Answer—"Yes."

Question—"But he said he couldn't pay you the forty thousand, and you told him then that you would lease it to him?"

Answer—"Yes."

Question—"And you fixed the lease money at three thousand a year?"

Answer—"Yes."

Question—"You told him how much you wanted; is that right?"

Answer—"Yes, in connection with he promised me everything, and I told him, 'Well, if you will do that, I will not go too high on you.'"

Question—"And you told him he could credit the lease money on the purchase price, and buy it for forty thousand?"

Answer—"Yes,—how is that?"

Question—"You told him he could credit the lease money on the \$40,000.00, and buy it for the forty thousand?"

Answer—"That lease money had to come out of the principal."

Question—"Is that right?"



(Testimony of Clara Ocamica.)

Answer—"That's what I told him. And when his time was up, I will have to get the rest."

Question—"The rest of the forty thousand?"

Answer—"Yes."

Question—"The money he paid you as rent every year was to apply on the forty thousand?" [96]

Answer—"Yes, he said he don't have it; and if he don't have it, he don't have it, and I don't study very long about it; and I said, "Well, if you don't have it, I will lease it to you on this paying off every year on the principal."

Question—"You would lease it to him, and the lease money was to apply on the purchase price, every year?"

Answer—"Uh, huh, and you could throw up the lease any time you wanted to; but I don't think it was all written down."

Question—"As you understood it, he could throw up the lease any time he wanted to, but that wasn't in the papers?"

Answer—"No. There was lots of things not written down; I never seen it, anyway."

Question—"When the lease and option was drawn up in Mr. Hall's office, he read the contract to you, didn't he?"

Answer—"Yes, he suppose to, yes."

Question—"He read it and went through it section by section?"

Answer—"I suppose he did, yes."

Question—"Do you remember sitting there and him reading and explaining the contract to you?"

(Testimony of Clara Ocamica.)

Answer—"He read it, but explain it, he wasn't; he never mentioned anything that was written down."

Now do you know whether or not those answers are correct?

A. I don't know. I wasn't with my dad. There was nobody with him, just Mr. Bybee. [97]

The Court: If you don't know, all you have to say is you don't know. If you can't say whether it is correct or not you just say you don't know, that is all. A. Thank you.

Q. (By Mr. Anderson): There is one thing I would like to clear up; going back now to the residence house out there, that residence house has two rooms, doesn't it? Two rooms downstairs and three upstairs? A. Three downstairs.

Q. And three up? A. Two upstairs.

Q. Two upstairs? A. Yes.

Q. That residence house you said was built part—a part at a time? A. Yes.

Q. Do you mean part of the rooms were built and then later other rooms built? A. Yes.

Q. You think that progressed over a period from 1919? A. Yes.

Q. Now the barn out there, that has been built for many years? A. No, it is a new barn.

Q. How long has the barn been built?

A. I couldn't say for sure. [98]

Q. Now you said the operation in 1949 that your father had was for varicose veins? A. Yes.

Q. Where were the varicose veins?

(Testimony of Clara Ocamica.)

A. In his leg.

Q. In his leg? A. Yeah.

Q. One of his legs? A. Yes.

Q. You spoke of Mr. Bybee coming to your place at Bruneau before going out to talk to your father? He came there for the purpose of finding out if your father's ranch was for sale, didn't he?

A. I don't know, I never seen him.

Q. He talked to your husband, didn't he?

A. Yes.

Q. Your husband is not here in court? A. No.

Q. Your brother Henry and his wife are not here in court? A. No.

Mr. Anderson: I think that is all, your Honor.

#### Redirect Examination

Q. (By Mr. Greenfield): Is your brother Henry out on the ranch, or where is he?

A. He is out on the ranch, yes. [99]

Q. Is it possible to drive out there or are they snowed in?

A. I imagine they are snowed in. I don't know. I imagine they are snowed in.

Q. One other question: Based upon your observations of old Mr. Rubelt and he having lived with you in 1950, and the things you have testified to as to his hearing and eyesight and mental condition; is it your opinion that Mr. Rubelt was mentally and physically capable of transacting his own business at the time he made this contract?

Mr. Anderson: Object on the ground that is improper redirect, leading and suggestive.

(Testimony of Clara Ocamica.)

The Court: I think that is improper redirect, and further more, she has testified as to all the facts, and I think that is for the Court to conclude.

Mr. Greenfield: Very well.

### Recross Examination

Q. You mean your brother is out at his ranch at Juniper Mountain?

A. I don't know where my brother is. [100]

### HARRIET URQUIDI

called as a witness, having been first duly sworn, testified as follows, upon

### Direct Examination

Q. (By Mr. Greenfield): State your name, please? A. Harriet Urquidi.

Q. Where do you live? A. In Boise.

Q. What address?

A. 4914 Edson Street.

Q. What—how old are you?

A. I am 22 years old.

Q. Are you the granddaughter of Mr. Rubelt?

A. I am the granddaughter of Mr. Rubelt.

Q. And you are the daughter of Mrs. Ocamica?

A. Yes, I am.

Q. In 1950, Mrs. Urquidi, were you attending school? A. I was.

Q. Where? A. St. Teresa's Academy.

Q. Where did you spend your weekends?

A. I spent my weekends and vacations and holidays at home.

Q. By home you mean at Bruneau? A. Yes.

(Testimony of Harriet Urquidi.)

Q. When did you start school at St. Teresa's?

A. Started in the fall of 1946.

Q. So this situation of spending weekends and holidays and summers in Bruneau took place in 1946 and through 1950?

A. That is right.

Q. Now during the period that you were going to school at St. Teresa's and living at home over the weekends and holidays, was Mr. Rubelt himself present on those occasions staying with your mother?

A. Yes, he was during the winter.

Q. When did he start spending the winters at Bruneau?

A. Well, I think in 1948.

Q. When you would come home on weekends he would be there?

A. Yes.

Q. Do you recall when Mr. Rubelt became ill in 1949?

A. He had a varicose operation. I don't remember what winter it was, but I think it was around that time.

Q. Now drawing your attention to these two or three years just prior to and including 1950, let's say 1948, 1949 and '50; what can you say regarding Mr. Rubelt's physical condition by that time and in particular let's discuss first his ability to hear?

A. My grandfather had poor hearing, it was impaired.

Q. He had what?

A. He had impaired hearing.

Q. What do you recall from your years there at home and your being with him on weekends that

(Testimony of Harriet Urquidi.)

lead you to believe that he was hard of hearing at that time? [102]

A. You had to speak above normal and he liked to listen to the radio, especially to the news, and he had to have his ear awfully close to it.

Q. How loud would he have it tuned up?

A. Louder than a normal person would.

Q. And if there happened to be some noise or distraction in the house what would he do?

A. He would just get up and leave and go to the bunk house and set up the radio as high as he wanted it so he wouldn't be disturbed.

Q. With respect to Mr. Rubelt's eyesight, what do you recall about that, in 1950 what was his condition on his eyesight?

A. Well, as long as I have known my grandfather he has liked to read the paper, and by that time he couldn't even read it, and in 1949, I think, or fall of 1948, he went to buy me the typewriter and couldn't see the dotted line to write his name on the check.

Q. Do you recall when you graduated from St. Teresa's?      A. Yes.

Q. Do you recall anything in connection with that graduation that would have a bearing on this eyesight problem?

A. Yes, I do. My grandfather paid for my graduation pictures and so naturally I brought them home, and when I showed him the pictures he couldn't see what it was. [103]

Q. Did he make any comment?

A. Yes, "Who is it?"

(Testimony of Harriet Urquidi.)

Q. Didn't even recognize you from your own picture?      A. No, he didn't.

Q. Now around this period of 1950, particularly after his operation in 1949; what can you say as to whether or not Mr. Rubelt seemed to live in the past or not?

Mr. Anderson: Object on the ground it is immaterial.

Mr. Greenfield: It is quite material. One of the points in this case is whether this old gentleman was mentally alert and up to date to know the value of this property at the time he sold it or whether he was living 30 years in the past. Perhaps it is the most material point.

The Court: I think you should have the witness testify to the facts. I think when you are talking about living in the past, most people live in the past. Find out from the witness what he did. I have got to know the facts rather than conclusions.

Q. Was there anything that you observed regarding your grandfather during this period that would indicate that he was concentrating and thinking in terms of the past rather than being aware and alert to the present time—the time he is presently living in?

Mr. Anderson: Object, it calls for a conclusion.

The Court: You might ask what she observed. Ask about what he did and what he said.

Q. Go ahead and tell the court what he would like to know about that?

A. Well, is anyone came to the house my mother

(Testimony of Harriet Urquidi.)

had to run out in front and tell him who it was to save him from embarrassment. Most of them were life-long friends he had known, and he didn't even recognize them, and on an incident where this man had died and we told him about it, and we talked about it and days later he said he didn't know that man was dead, and it was nothing for grandfather to fall asleep during the meal.

Q. He fell asleep while eating?

A. Yes, he slept most of the time when he came back in 1950.

Q. This was 1950?                      A. Yes.

Q. It was during this period this transaction we are talking about took place?

A. Yes, and if we were talking about anything like world matters or anything, he would be in Germany, what he would do in Germany.

Q. Did he seem to have much interest about his present surroundings at that time and the things going on?

Mr. Anderson: Object on the ground that calls for a conclusion.

The Court: What was the question?

(Reporter read the pending question.) [105]

A. Will you repeat that again.

Q. Did Mr. Rubelt in 1950 from your conversations with him and your observations of his conduct, did he appear to have much interest in the things then around him, and things going on about him at that time?                      A. No, he did not.

Q. Where did his interest seem to center?



(Testimony of Harriet Urquidi.)

A. Germany.

Q. What did he talk about mostly?

A. He lived in the past—what he would liked to have seen done.

Q. What about Mr. Rubelt's ability to remember, or his memory during this period?

A. Grandfather had a poor memory.

Q. A poor memory?            A. Yes.

Q. Tell a little more in detail what you saw or observed that would lead you to make that conclusion?

A. Well, like I told you about the man that died and he didn't even know he was dead.

Q. Go ahead.

A. We told him time and time again, and talked about it and all of a sudden he wouldn't be in the conversation, and he would say, "I didn't know he was dead, when did he die?" [106]

#### Cross Examination

Q. (By Mr. Kaufman): Your grandfather does not wear glasses, does he?

A. He is past that stage. I don't think it would do him any good to wear glasses.

Q. Has he ever tried?

A. Been to eye doctors several times.

Q. But has he ever worn glasses at all, and really made an effort to wear glasses?

A. I couldn't answer that.

Q. That you know of?

A. Not that I know of.

(Testimony of Harriet Urquidi.)

Q. Of course, he spent a great deal of his life, practically all of his life at least, out here in Idaho on the ranch out by Riddle, had he not?

A. Yes, we visited him frequently.

Q. And that ranch is where his interests were, were they not? A. I suppose.

Q. And after he had entered into this agreement with Mr. Bybee, and Mr. Bybee was running the ranch and he was living in town with your mother, his interests—his real interests were away from him, weren't they? He wasn't there at the ranch where he had been all his life?

A. He never used to tell me things like that when he came to visit us. [107]

Q. But before he came on visits did he—he had visited with your mother before?

A. Yes, he stayed with us during 1948.

Q. But during this period of time you were speaking about, around 1950, he was staying there more frequently than he ever had in the past, hadn't he?

A. He stayed lots of winters with us before that.

Q. But during that period or those periods, he still had the ranch that he could go back with—back out to after the winter was over? He had things to do out there, did he not?

A. I don't know.

Q. Well, he would go to the ranch?

A. He would go to the ranch. I don't know what he did.

(Testimony of Harriet Urquidi.)

Q. And after he entered into the agreement with Mr. Bybee he no longer had the ranch to occupy his interests, and there was really nothing around your mother's place that would occupy his interests; was there? A. He had us.

Q. Well, he had the family, yes, but he didn't have the work and so forth that he would have had normally if he still had his ranch?

A. I don't know what work he had at his ranch.

Q. You don't know what work he had at his ranch? A. Yes.

Q. Did you say he spoke of Germany?

A. Yes. [108]

Q. Recalled things in his youth?

A. Yes.

Q. And things that had transpired through the years, the war and I suppose things of that sort?

A. I don't know whether he was dreaming about them or not.

Q. Well, he discussed them?

A. Yes, he discussed them.

Q. Now with regard to not recalling something you had told him about a short time before; you figure he was forgetful of things?

A. Yes, definitely.

Q. Many of us are forgetful about things; aren't we?

A. Not things you talk about all the time, and just keep mentioning over and over again, and then you normally don't forget things among your friends.

(Testimony of Harriet Urquidi.)

Q. You heard Mr. Anderson read his testimony to your mother?      A. Yes.

Q. His memory was quite clear at the time of the taking of that deposition way back when he first came to this country; wasn't it, and so forth?

A. I don't know anything about his personal affairs.

Mr. Kaufman: I believe that is all.

Mr. Greenfield: That is all.

(The witness was excused.)

The Court: We will take a short recess. [109]

After recess, 3:00 p.m.

The Court: You may proceed.

### STEVE HOOKLAND

called as a witness, having been first duly sworn, testified as follows, upon

#### Direct Examination

Q. (By Mr. Greenfield): Will you state your name?      A. Steve Hookland.

Q. Where do you reside?

A. Oh, in Idaho and Nevada, around Mountain Home and Nevada.

Q. You are in Mountain Home now?

A. Yeah.

Q. How long have you lived around the Bru-neau, Riddle and Mountain Home area?

A. After—since about 1936.

Q. 1936?      A. Yeah.

Q. Are you acquainted with Mr. Henry Rubelt?

(Testimony of Steve Hookland.)

A. Yes.

Q. How do you happen to be acquainted with him?

A. Well, I worked for him and his son.

Q. When did you first go to work for Mr. Henry Rubelt?

A. I think it was 1936 or 1937, I don't know which.

Q. How long did you work for him on that occasion?

A. About three or four months during hay.

Q. That is in the summer time? [110]

A. Yeah.

Q. What kind of work did you do?

A. Well, ranch work and hay, mostly hay then.

Q. That would then be in 1937?

A. Yeah.

Q. Did anyone else work with you in the hay?

A. Well, the first couple of years I was alone.

Q. But Mr. Rubelt himself and Henry, the boy, were there?

A. Yeah, and the two nephews.

Q. Who were they?

A. Raymond and Jim Ashby.

Q. Did you work for Mr. Rubelt any following 1937?

A. Yes.

Q. Up until when?

A. I think about 1940 was the last.

Q. 1940?

A. I wouldn't say for sure, but I think around 1940.

(Testimony of Steve Hookland.)

Q. Then you quit and didn't work for him for a while after that?      A. Yeah.

Q. And then did you go back to work for him later?      A. No.

Q. Did you work for him in 1944 and 1945?

A. Well, I don't remember the years, but the last time I worked for him Hank had three children.

Q. I didn't hear you. [111]

A. I don't remember the years it was, but the last time I worked for Hank he had three children.

Q. During the war or so?

A. Yeah, during the war.

Q. You were doing general ranch work?

A. Yeah. I worked in the winter through that year.

Q. Now during the years you have worked for him can you tell us how much hay was put up at the place that you had personal knowledge of each year?

A. Well, there was six or seven stack yard, and must have been about 50 ton to a stack yard.

Q. What would you estimate the average amount of hay yield in the Rubelt place to be during those years that you worked in the hay?

A. About 325 ton.

Q. When were you most recently on the Rubelt place? You have been on it since Mr. Bybee took it over?      A. Yeah.

Q. About what year was that?

A. 1950 or 1951. I was there fishing at that time.

(Testimony of Steve Hookland.)

Q. Now did you have occasion at that time to notice the condition of the meadow land and the kind of hay crop he was——

Mr. Anderson: Object on the ground that is irrelevant and immaterial.

The Court: I don't see the materiality of it.

Mr. Greenfield: It may not be material at this time, perhaps I am anticipating a defense that they don't grow enough hay or as much hay as they used to. I will withdraw it.

Q. (By Mr. Greenfield): Was there a time, Mr. Hookland, in 1951 when you were working for Charlie Sewell? A. Yeah.

Q. Where is Charlie Sewell's place with respect to Mr. Rubelt's? A. Just east.

Q. Is it adjoining?

A. No, the land don't join. The cattle runs back and forth though.

Q. In 1951 while you were working for Mr. Sewell did you have occasion to stop and see Mr. Rubelt? A. Yes.

Q. Did you have occasion to see Mr. Rubelt from time to time?

A. Well, I was driving truck and did see him once in a while and I would stop over at Clara's and see him.

Q. By Clara you mean Mrs. Ocamica?

A. Yes.

Q. On these occasions when you would stop past and see him what can you tell us with reference to his mental capacity, and in particular with re-

(Testimony of Steve Hookland.)

spect to his memory? Was there anything you observed about him or was there any conversation you had [113] with him that would give you an opinion as to the state of his memory?

Mr. Anderson: We object on the ground it calls for a conclusion of the witness.

The Court: Yes, I think that is right, but I am wondering what difference it makes in 1951. This lease was entered into in 1950.

Mr. Greenfield: The amended contract was entered into later than 1951, and——

The Court: According to the pleadings it was entered into on December, 1950.

Mr. Greenfield: I am in error then. I am sorry. But it would seem to me that the proximity of six months to a year is close enough to be material.

The Court: The objection will be sustained.

Q. (By Mr. Greenfield): Do you recall having seen Mr. Rubelt in 1950? A. No, I don't.

Q. Were you working for Charlie Sewell in 1950?

A. No, working at the Spanish Ranch.

Q. Is that in Nevada? A. Yes.

Q. You didn't come back to Idaho until 1951?

A. When I worked for the Spanish Ranch I came down this way couple of times with the truck.

Q. Did you see Mr. Rubelt on this occasion?

A. I don't know whether I did or not. I stopped one time, but don't remember whether or not he was there.

Q. You remember 1951; those are the occasions you remember? A. Yes.



(Testimony of Steve Hookland.)

Cross Examination

Q. (By Mr. Anderson): You say you estimated the hay on the place at 6 to 7 stack yards with 50 tons in each stack yard? A. Yes.

Q. You didn't measure that hay? A. No.

Q. Just an estimate on your part?

A. Well, I measure a lot of hay at different times.

Q. I mean this hay, the hay of the Rubelt place; you didn't measure? A. No.

Redirect Examination

Q. (By Mr. Greenfield): You say you have measured lots of hay? A. Yeah.

Q. Have you put up lots of hay?

A. Yeah.

Q. Do you think you could measure or estimate the amount of hay in a stack pretty close?

A. I think so.

Q. Would you say you were stacking 325 tons of hay; you feel you are fairly accurate on that statement? A. Yes.

(Witness was excused.) [115]

ALBERT L. HARLEY

called as a witness, having been first duly sworn, testified as follows, upon

Direct Examination

Q. (By Mr. Greenfield): Will you state your name? A. Albert L. Harley.

Q. Where do you live? A. Bruneau.

Q. How old are you? A. 71.

(Testimony of Albert L. Harley.)

Q. Now of those 71 years how many of them have you lived in the Bruneau area?

A. How many?

Q. How long?

A. Must be 70 years and a few months.

Q. So you went to live in Bruneau when you were just a few months old, and you lived there ever since?

A. That is right.

Q. Do you own a ranch out on those parts?

A. Near Bruneau?

Q. Yes. A. Yes.

Q. Is that in Little Valley?

A. Little Valley, yes.

Q. What kind of a ranch is that, Mr. Harley?

A. Just a stock ranch.

Q. It is a general stock ranch?

A. That is right.

Q. How long have you owned that ranch?

A. Since 1908.

Q. And you have been operating it ever since then?

A. Yes.

Q. Do you hold a public office in Owyhee County?

A. I guess I do.

Q. What is that office?

A. County Commissioner, Third District.

Q. The Third District of Owyhee is what area?

A. Well, from the range land between Grandview and Bruneau east to the Nevada line.

Q. Are you familiar with the location of the old Henry Rubelt place?

A. That is right.

Q. Is that in your district?

A. Yes.

(Testimony of Albert L. Harley.)

Q. How long have you known Henry Rubelt, Senior?      A. Well, some 40 odd years.

Q. Do you consider yourself pretty well acquainted with him?      A. Well, pretty well.

Q. Have you had occasion to see him frequently through the years? [117]

A. Yeah, a few times.

Q. You mean a few times over 40 years, or a few times a year?

A. Well, that is the last few years. A long time ago when the freights, you know they used to come in and made my place a stopping place going through and I suppose they hauled back in the winter with provisions.

Q. Mr. Rubelt would stop at your place from time to time?      A. Yeah, he has.

Q. And always has since you first knew him?

A. That is right.

Q. Have you been out to the Rubelt ranch itself?

A. Have I ever been there, is that what you mean?

Q. Yes.      A. Yes, I was there.

Q. As a matter of fact, you rode over before it was homesteaded; is that right?

A. That is right.

Q. Are you familiar with the range land that the Rubelt place uses to graze its cattle on the public domain?      A. Yes, very familiar.

Q. How do you happen to be familiar with that?

A. Well, I used to ride in that country.

(Testimony of Albert L. Harley.)

Q. You buckarooed your own cattle all through that area?

A. We lived just adjacent to that.

Q. Just adjacent to it? A. That's right.

Q. You are familiar with the ranch land that is involved on the Rubelt grazing land?

A. Yes, I can say that.

Q. You have seen the meadow land, hay land, on the Rubelt place? A. Yes.

Q. You are familiar with the ranch house and out buildings? A. Yes.

Q. Have you seen those? A. Yes.

Q. Have you ever stayed at the ranch house?

A. Yes.

Q. Tell the Court what kind of a house it is as best you can remember? A. Nice house.

Q. Comfortable place?

A. It was a comfortable place.

Q. There has been testimony in this case from the official from the Bureau of Land Management that Mr. Rubelt has a Graze 1 cow right of 450 head with 25 horses, making total Graze 1 right of 475 head; based upon your knowledge of the property, your personal knowledge of the ranch, and the fact that the place carries a 475 head right; do you have an opinion as to the value of the Rubelt place in 1950?

Mr. Anderson: Object on the ground no proper foundation has been laid and it is incompetent. [119]

Mr. Greenfield: I asked him if he had an opinion.

The Court: He may answer that question.

(Testimony of Albert L. Harley.)

Q. Do you have an opinion? A. Yes.

Q. In the course of your duties as a county commissioner do you have occasion to familiarize yourself with land values through your district?

A. Yes, to a certain extent.

Q. Do you think you have a general knowledge of the value of property in that area in 1950?

A. Yes.

Q. I will ask you to state what you believe in your mind the value of the Rubelt property to be in 1950, the fair market value?

Mr. Anderson: Object on the ground no proper foundation has been laid. It is incompetent and immaterial.

The Court: Objection sustained. Just a general knowledge doesn't give him any qualification to testify to that.

Q. Mr. Harley, you own a cattle ranch yourself?

A. Yes.

Q. And you own a stock ranch in the same general area? That is the Owyhee County area?

A. You mean on the range?

Q. Yes. A. Yes. [120]

Q. Are you familiar with the value of the ranch property and range rights through the years in that area and what they have been bought and sold for without reference to any specific sales? A. Yes.

The Court: You are going to have to put this up somewhere near close to the time of this transaction.

(Testimony of Albert L. Harley.)

Through the years doesn't mean anything to this court.

Q. Do you believe in that in 1950 you were aware of the value of ranch property and of range rights in that area at that time?

A. Well, I think I am, considering it is my home.

Q. Considering the fact that you are a county commissioner is it part of your job to be aware of land values in this district?      A. Yes, sir.

Q. I will then ask you again your opinion as to the fair market value of the Rubelt property in 1950?

Mr. Anderson: Object on the ground no proper foundation has been laid and it is incompetent, irrelevant and immaterial.

(Argument followed off the record.)

The Court: I am going to let him answer for what it is worth.

Q. What is your opinion then, Mr. Harley, of the fair market value of the Rubelt property in the spring of 1950 when this transaction here was entered into? [121]

Mr. Anderson: If the Court please, I renew my objections and I point this out at this time. The transaction made in April of 1950 was one of lease with option to purchase at a future time—ten years in the future. It was not a sale transaction. It was purely a lease transaction. Now, I think if Mr. Bybee prevails in this action that he will exercise the option, nevertheless to this time the transaction is one of lease with an option in the future. I main-

(Testimony of Albert L. Harley.)

tain that the value back at the time the lease was made is not relevant here.

The Court: For whatever it is worth I am going to let this testimony go in. Your objection will be in the record. I have some doubt about it, but inasmuch as this is a court case I am going to let it in for whatever it may be worth.

(Pending question read.)

“Q. What is your opinion then, Mr. Harley, of the fair market value of the Rubelt property in the spring of 1950 when this transaction here was entered into?”

A. I should say in my own mind it was worth about \$200 a cow unit.

Q. What would be your round figure—we will go back and develop how you arrived at it?

A. What I mean is that you take a ranch without a cow unit—— [122]

The Court: That isn't the question.

Q. Now what is that opinion, that is the question. What in your opinion is the value of the ranch?

A. Seemed like at that time that was always talked about—the cow units, that is all I can go by.

Q. You say \$200 a cow unit. Do you have reference to 475 head range right that the Bureau of Land Management testified to?

A. Well, if he has that.

Q. So if he has 475 head graze 1 right and raises 325 to 350 tons of hay, would you be—would it be your opinion that he had 475 cow units?

(Testimony of Albert L. Harley.)

A. That is right.

Q. So then your estimate of the value, or your statement of value is \$200 a cow unit? Would you multiply that out for the Court so it is in the record? 200 times 475 would be your statement of value; is that correct? A. Yeah.

Q. I multiply that out to be \$95,000; is that your opinion? A. I never added it up.

Q. Sir? A. I never multiplied it.

Q. Maybe we had better have you multiply it.

Mr. Anderson: I think the record will speak for itself.

The Court: The court can figure it. [123]

Q. We are dealing here also with a lease arrangement with an option tied on to the end of it, so I would like to get your opinion, if you have one, as to the fair rental value of that property on a yearly basis at that time?

Mr. Anderson: Object on the ground no proper foundation has been laid. It is irrelevant and incompetent and immaterial.

The Court: Objection sustained. I don't think the foundation has been laid.

Q. Do you have any information as to what range rights were renting for in that area at about that time? A. No, I don't believe I do.

Q. Do you have any idea of what hay was selling for at about that time? A. How is that?

Q. Do you have any idea of what hay was selling for at about that time?



(Testimony of Albert L. Harley.)

A. 1950, I think about \$18.

Q. As a ranch owner and operator do you have an opinion as to what you would rent a ranch for, and what you think would be a fair rental price on a yearly basis on similar property in that area?

Mr. Anderson: Object on the ground that is incompetent and immaterial.

Q. I asked if he had an opinion. [124]

The Court: Well——

Mr. Greenfield: I will ask another question.

Q. Do you think in 1950 you were informed and knew the retail value of ranch property in that area? A. Yes, I do.

Q. Then I will ask you what in your opinion was the rental value on a yearly basis of the Rubelt property in 1950?

Mr. Anderson: Object on the ground that is incompetent, irrelevant and immaterial. It is not within the issues of this case, and no proper foundation has been laid.

The Court: He may answer.

Q. What would you say would have been a fair rental value on the Rubelt property in 1950 on a yearly basis? A. That many cattle?

Q. 475 head? A. \$6,000 or \$7,000.

Q. How do you arrive at the figure you give us of \$6,000 or \$7,000 a year? What makes you believe it would be worth that?

A. Well, the stock range as I know it is a good range.

(Testimony of Albert L. Harley.)

Q. Does the amount of hay raised enter into your calculations?

A. I don't know how much hay he puts out.

Q. Well, the testimony in this case is that he puts up 325 to 350 tons a year?

A. Yes, that would have to be considered. [125]

Q. How much would you say that hay was worth in 1950?

A. Well, I should say about \$18.

Q. Taking into consideration the range right and the ranch as you know it, and the amount of hay and value of it, it is then your opinion \$6,000 or \$7,000 a year was a fair rental price at that time?

A. Yes.

Q. Directing your attention from around 1949, 1950, what can you say as to Mr. Rubelt's personal physical condition during those years with particular reference to his hearing, if you had occasion to notice whether or not he had or didn't have impaired hearing?

A. Well, the only time I noticed was I met him several times and where he used to speak to me, you know, or talk, why I would have to get in close to him and tell him and——

Q. Well, what in particular did you notice about his hearing?

A. Well, he had been failing, naturally.

Q. His hearing wasn't as good as it used to be?

A. No.

Q. What can you tell us as to whether or not he was able to recognize you immediately?

(Testimony of Albert L. Harley.)

A. Well, after I talked to him a little bit why then he recognized me.

Q. Did he seem to recognize you to start with or only after a while did he recognize you?

A. Well, I don't know how long it was. Two or three minutes talking with him and he finally knew who I was. [126]

Q. When you testified that in your opinion the fair market price of the Rubelt place in 1950 would have been approximately \$95,000 you are talking about cash money?

A. Yeah, that is right.

Q. Or at least money where you would get interest on the balance?      A. Yes.

Q. Now would you think, Mr. Harley, that an arrangement whereby Mr. Rubelt in 1950 entered into a ten year lease of the ranch at \$3,000 a year with an option then the tenth year to purchase the place for \$40,000 with the ten years of rental payments, \$3,000 a year or \$30,000 to be applied on the purchase price, and the balance of the \$40,000, or the sum of \$10,000 to be paid over an additional three year period, and with Mr. Rubelt to pay all the taxes and state land lease rentals for the ten year period, and with the balance drawing no interest; would it be your opinion that that was a fair deal and a fair price for that place.

Mr. Anderson: Object on the ground that is incompetent and irrelevant. Calls for a conclusion of the witness.

(Testimony of Albert L. Harley.)

The Court: Objection sustained. That is a question for the court.

Cross Examination

Q. (By Mr. Anderson): You are County Commissioner of Owyhee County? A. Yes. [127]

Q. How long have you been county commissioner? A. Ten years.

Q. You were county commissioner back in the year 1950?

A. I was county commissioner when?

Q. In 1950? A. That is right.

Q. And as county commissioner you sit on the County Board of Equalization to equalize and fix the values on different taxes on property in your county? A. Yes.

Q. And did back in 1950? A. Yes.

Q. And did equalize the property in the district that you represent, as well as throughout the whole county? A. Yes.

Q. Now did you assess property in Owyhee County, the full cash value or percentage of the full cash value? A. Percentage?

Q. What percentage of the full cash value did you assess for lands on the taxes on the Rubelt property? A. 35 per cent.

Q. You assessed that type of land at 35 per cent on the full cash value; is that right?

A. Yes, that is right.

Q. That was back in 1950? A. Yes. [128]

Q. And in 1949? A. Yes.

Q. Has that been true ever since?

(Testimony of Albert L. Harley.)

A. Yes, that is right.

Q. So the assessment of the Rubelt place for the year 1949 will be 35 per cent approximately of what you considered to be its full cash value; is that right?

A. Well, that is—the real estate value.

Q. Well, that is the assessment on the Rubelt place; isn't it?

A. Yes, the assessment, that is right.

Q. And the same is true in 1950?

A. That is right.

Q. Do you know what the assessed value of the Rubelt place was in 1950?

A. No, I couldn't say right off hand.

Q. Now the assessment of property is made as the law requires as of the second Monday of January at twelve noon?

A. That is right.

Q. And the assessment was made in the year 1950, wasn't it?

A. Yes.

Q. There wasn't any great fluctuation of value between the second Monday of January, 1950, and the 12th day of April, 1950, was there?

A. No. [129]

Q. But you are not able to tell us what the assessed value was?

A. No, I am not able to.

Q. Do you know what the tax rate was per hundred dollars on assessed valuation in that locality back in the year 1950?

A. \$3.00 a hundred.

Q. Was that the county levy or did it include

(Testimony of Albert L. Harley.)

the school levy?           A. County levy.

Q. What about the school levy?

A. Well, the school levy is—that is a little different than the county levy.

Q. What was the total tax levy made on the property in that area per one hundred dollars assessed value in the year 1950, as near as you can tell us?

A. What was the tax valuation?

Q. What was the rate of levy on the property? On the Rubelt place in that area?

A. \$3.00 and some odd cents.

Q. That is for the county alone, isn't it?

A. Well, I want—I don't want to get mixed up on that.

Q. Well, what is the total levy out there this year? I mean 1954?

A. I think the school was in that levy.

Q. In the \$3.00?           A. I think so. [130]

Q. Was the state in that levy too?

A. That is right.

Q. The total levy then as near as you recall in 1950 per hundred dollars of assessed value out there was \$3.00 and what?

A. Some fraction. I don't remember the fraction of cents.

Q. Now Henry Rubelt whom you have known for quite some years is rather a remarkable man for his age; isn't he?           A. He is.

Q. I beg your pardon?           A. He is.

Q. Still is a rather remarkable man for his age?

(Testimony of Albert L. Harley.)

A. Well, you know I have known him for quite a while. I know he has failed in the last few years.

Q. But still quite a remarkable man for his age; isn't he?      A. That is right.

Q. Has a remarkable mind for his age?

A. Well, I don't know about that.

Q. You conversed with him today in the hall?

A. No, I never talked to him.

Q. You didn't talk to him today?

A. Not today, talked with him yesterday.

Q. Yesterday?      A. Yes. [131]

Q. You think his condition now isn't quite as good as it was last year?

A. Well, I couldn't say that, Gene, I don't know. I just know that he is naturally failing, you know, since I have known him all my years.

Q. How long would you say he has been failing?

A. That I have known him?

Q. How long has he been failing?

A. I should say the last five or six years that I have noticed.

Q. And up to five or six years ago you didn't see any change in him?

A. Oh, yes, you can see a change in him.

Q. Well, he was not failing up to five or six years ago?

A. I don't know how to answer that. The only thing I know he had been failing the last few years. I don't know just how long.

Q. You still are able to converse with him; aren't you?      A. Yes, that is right.

(Testimony of Albert L. Harley.)

Q. And he talks rational; doesn't he?

A. Yes.

Q. And recognizes what you say to him?

A. Well, he is a little hard of hearing, more than he used to be, that is the only thing.

Q. Just a little hard of hearing?

A. Yes. [132]

Q. But you don't have any difficulty in making yourself heard in your conversation with him?

A. No, have to talk loud, you know.

Q. Talk little louder than you do normally?

A. Yes, I do, that is right.

Q. How long has it been since you have been down to the ranch house on this Rubelt place?

A. I think it was '37 when I was there and stayed all night.

Q. 1937? A. Yes.

Q. Have you been there at all since?

A. No.

Q. You haven't been at the Rubelt place since 1937? A. No.

Q. You have some range in the Jack Creek Meadows area?

A. That is right, and the Potholes.

Q. That is some distance north of the ranch of Mr. Rubelt?

A. Yes, and ahead of Blue Creek.

Q. And you have had sheep drift over to the Rubelt ranch? A. Yes.

Q. And some drift of the cattle over to his ranch? A. Yes.



(Testimony of Albert L. Harley.)

Q. Young Henry is taking care of it?

A. He is what?

Q. Young Henry takes care of this drift of the Rubelt cattle? [113]

A. Used to.

Q. I mean when he operated it then?

A. That is true, yes.

### Redirect Examination

Q. (By Mr. Greenfield): When you assess a stock ranch you are making assessment on the real property, aren't you?      A. That is right.

Q. You don't tax the range right, the Federal range right?

A. No, not the Federal range, no.

### Recross Examination

Q. (By Mr. Anderson): Don't you take into consideration the carrying capacity of land in arriving at your valuation?

A. What do you mean?

Q. Don't you take into consideration the carrying capacity in arriving at your valuation?

A. Yes.

Q. In other words, the range rights that are attached are a part of this?

A. Yes, that is what makes a range.

Q. That is what gives it its value?

A. Yes.

Q. That is what you take into consideration in

(Testimony of Albert L. Harley.)

fixing that value for tax purposes, isn't it?

A. That is right. [134]

### Redirect Examination

Q. (By Mr. Greenfield): If you consider a Federal range right to be \$200 a head and if you consider a stock ranch, the land itself to be worth so much an acre and you are assessing that ranch, do you assess it on the basis of the real estate per acre, or do you assess it on the basis of \$200 a head on the Federal range right?

Mr. Anderson: Object on the ground that is argumentative, leading and suggestive and improper redirect.

The Court: Objection sustained.

Q. Well, when you are assessing the value of a place for tax purposes do you include the value of the Federal range right, or don't you?

A. In assessing lands you mean?

Q. Yes.

A. No, I don't believe we do.

Q. (By Mr. Anderson): Do you take into consideration the range right in arriving at the value of the land in which you are assessing?

A. That is right.

Mr. Greenfield: I am not sure I understand. He has answered it both ways now.

The Court: Yes. Go ahead and find out how he arrives at the value of the land. [135]

Q. When you arriving at a tax valuation on a

(Testimony of Albert L. Harley.)

piece of ranch property, what factors do you take into consideration in trying to place a value upon that ranch?

A. You mean as a commissioner?

Q. As a commissioner for purposes of taxation?

A. Well, the—we don't consider the cow unit.

Q. You don't consider the cow unit?

A. Just the value of the land. You take meadow land, worth so much you know, and there is different prices, and grazing land.

Q. Now on grazing land, you are talking about deeded land?           A. That is right.

Q. Owned by the person you are assessing?

A. That is right.

Q. Do you take into consideration the value of the Federal range right for tax purposes?

A. No, I don't.

Mr. Greenfield: That is all.

Q. (By the Court): I want to know whether the fact that that ranch has attached to it a Federal grazing right incident to the use of that land, whether that increases the value of the ranch, and whether you take that into consideration?

A. You mean——

Q. For tax purposes? [136]

A. For tax purposes.

Q. Putting your evaluation on it?           A. No.

Q. In other words, the land is worth just as much without the grazing right as it is worth with it; is that right?

A. No, I didn't say that.

(Testimony of Albert L. Harley.)

Q. I am talking about for tax purposes?

A. Well, the tax is what they raise on an acre of land.

Q. Would you put the same assessed value on that ranch if it didn't have the grazing right?

A. You mean the cow unit?

Q. Yes. Would you put the same value on the ranch for assessment purposes without the grazing right as you would with it for tax purposes?

A. It would be the same.

The Court: That is all.

(The witness was excused.)

The Court: We will recess until tomorrow morning. [137]

Next day, February 9, 1955, 10:00 a.m.

### LEONADRO TOTORICA

called as a witness, being first duly sworn, testified as follows, upon

#### Direct Examination

Q. (By Mr. Greenfield): Will you state your name? A. Leonadro Totorica.

Q. Where do you reside?

A. I reside at Mountain Home.

Q. How long have you lived in the Mountain Home-Bruneau area? A. 23 years.

Q. Where were you born?

A. I was born in Bruneau.

Q. Until recently did you own a stock ranch?

(Testimony of Leonadro Totorica.)

A. Yes.

Q. Where? A. Juniper Mountain.

Q. Tell the Court where Juniper Mountain is generally with respect to the area of Riddle?

A. That is about 40 miles west of Rubelt's place.

Q. You are referring to the old Henry Rubelt place? A. Yes.

Q. That is the ranch that is here in litigation?

A. Yeah. [138]

Q. How long did you own this property at Juniper Mountain, when did you buy it?

A. About 20 years.

Q. 30 years? A. 20 years ago.

Q. Were you in that with your brothers?

A. Yeah, three of my brothers.

Q. Did you recently sell out to them?

A. Yeah, I sold to them.

Q. When was this?

A. That was the fall of 1952.

Q. In the fall of 1952?

A. Wait a minute, I think it was '53.

Q. Have you been on the old Rubelt place?

A. Yes.

Q. When did you first see that place?

A. 1931.

Q. Then was there a time when you worked for Joe and Charlie Sewell on the Beacon place?

A. Yes.

Q. Where is the Beacon place?

A. That is east of Rubelt's place.

(Testimony of Leonadro Totorica.)

Q. In any event, the Beacon ranch is right next to the Rubelt place?      A. Yeah, east. [139]

Q. How long did you work there?

A. Six months.

Q. Now during the period that you were working on the Rubelt place, and then later during the years you owned a ranch along with your brothers on Juniper Mountain, would you have occasion from time to time to pass through the Rubelt place?

A. Yes, I was through there once in a while.

Q. You have seen the meadow land there?

A. Yes.

Q. You have seen the ranch house and the out buildings?      A. Oh, yes.

Q. You have seen the reservoirs on the place?

A. Yes.

Q. Are you familiar with the range that the Rubelt's cattle run on?      A. Yes.

Q. And you have ridden that range yourself?

A. Yes.

Q. Directing your attention to the year 1950, what can you tell the Court with respect to the old Mr. Rubelt, and his physical condition with particularity to his hearing ability?

A. Well, he can't hear very good at that time.

Q. What do you know regarding his eyesight?

A. I wouldn't know anything about the eyesight.

Q. You know he had trouble hearing you?

A. Yeah. [140]

Q. Can you tell the Court whether or not Mr.

(Testimony of Leonadro Totorica.)

Rubelt at that time appeared to be mentally alert?

A. Well, he is kinda slow all the time, I suppose it is because of his age maybe.

Q. You say he was kinda slow? A. Yeah.

Q. What do you mean by that?

A. Well, he wouldn't get the meaning of something.

Q. He wouldn't get the meaning of something?

A. Yeah, what you were talking about.

Q. In having conversations with him yourself you observed that? A. Yes.

Q. What do you recall regarding any conversation with him, or any observation of him with respect to whether or not his memory appeared good or bad?

Mr. Anderson: Fix that as to time.

Mr. Greenfield: During 1950?

A. Well, he was slow, just slow getting things.

Q. And slow remembering? A. Yeah.

Q. Now, Mr. Totorica, from having been on the range in the area of the Rubelt place, and having sold it in 1952 or 1953; do you think that you have a knowledge, a general knowledge, of stock ranch values in that area in 1950? A. Yes. [141]

Q. Do you think you have a knowledge?

A. Yes.

Q. Are you familiar with the value of similar property to the Rubelt place at that time in that area?

A. Well, the ranches were selling at the price of a cow unit.

(Testimony of Leonadro Totorica.)

Q. That is the value of those places was generally arrived at by so much a cow unit?

A. Yes.

Q. Now the testimony that has been previously presented here in this trial shows that the Rubelt place had a cow right, Federal range right of 475 head, Graze 1 right? A. Yes.

Q. The testimony further shows that the Rubelt place produced 325 to 350 ton of hay, so that there was sufficient hay for the cattle in the winter months.

Mr. Anderson: We object to the last statement by counsel that there was sufficient hay. There is no evidence of that. We ask that be stricken.

The Court: That portion may be stricken.

Q. The evidence is there was 325 to 350 ton of hay, and based upon your familiarity with the area, you having sold similar property and your familiarity with land values that you testified to, and those facts; is it your opinion—what in your opinion was the value of the Rubelt place, fair market value in 1950? [142]

Mr. Anderson: Object on the ground that it is incompetent, and the witness has not been properly qualified. I would like to inquire in aid of objection.

The Court: Very well.

Q. (By Mr. Anderson): You were one of the four brothers of the Totorica Company?

A. Yes.

Q. That was a corporation? A. Yes.



(Testimony of Leonadro Totorica.)

Q. That corporation had some grazing land out in the Juniper Mountain area? A. Yes.

Q. And it had a ranch down at Grandview next to the river? A. Yes.

Q. And it had sheep? A. Yeah.

Q. And what you sold was your stock in Totorica Company, wasn't it, your corporate stock?

A. Yes.

Q. You didn't sell any ranch? A. No.

Q. You didn't own any ranch of your own, it was the company's ranch?

A. It was the corporation's.

Q. Yes. That sale you say was in 1953?

A. 1953. [143]

Q. Prior to that time your occupation was herding sheep, wasn't it? A. Running sheep.

Q. Running sheep. You actually went out and herded them; didn't you? A. Yes.

Q. Tended camp?

A. No, not tending camp, take care of the cow tenders and things like that.

Q. That has been your occupation since you were a boy?

A. No, that was my occupation last four years in the Totorica Company. I was herding sheep before.

Q. You were herding sheep before that?

A. Yes.

Q. And you herded from the time you were a boy before you sold out three or four years ago?

A. Yes.

(Testimony of Leonadro Totorica.)

Q. Which is it?

A. Four years before.

Q. Four years before you sold out?

A. Not four years, before I was herding sheep and then I was foreman. I was running the sheep from 1951 to—from 1950 to—I will say from 1949 to 1953.

Q. And since you sold out what has been your occupation?      A. Bartender, tending bar.

Mr. Anderson: We object on the ground the [144] witness has not been properly qualified, and that the evidence is incompetent.

The Court: The objection will be sustained.

Mr. Greenfield: I would like to make an offer of proof on this witness.

The Court: Very well.

Mr. Greenfield: Comes now the plaintiff and offers to prove by the witness Leonadro Totorica that if this witness were permitted to testify he would testify in his opinion the value of the old Henry Rubelt place in 1950 was approximately \$100,000, and that the basis of his valuation is that the cow right on the place was worth approximately \$200 per animal unit. The witness would further testify that in his opinion the fair rental value of the Rubelt property in 1950 on a yearly basis was \$7,000 to \$7,500 per year.

Mr. Anderson: We object on the ground that the witness has not been qualified to so testify, and that it is incompetent and irrelevant.

The Court: The objection will be sustained.

(Testimony of Leonadro Totorica.)

Mr. Greenfield: That is all.

Cross Examination

Q. (By Mr. Anderson): You have known Mr. Rubelt casually, I take it, for quite some time?

A. Yes. [145]

Q. He is a rather remarkable man physically and mentally, isn't he? A. Yes.

Q. Man of very strong physique?

A. Yes.

Q. And very strong personal opinions?

A. Yes.

Q. Is that right? A. Yes.

Q. Very strong mind down through the years; is that right? A. Yes.

Q. And you were able to talk to him all right, but he was just a little hard of hearing; wasn't he?

A. That is right.

Q. You were able to carry on a conversation with him; weren't you? A. Yes.

Q. Even up to this time you are able to carry on a conversation with him in a normal way; aren't you? A. Yeah.

Q. And you have carried on conversations with him here during the course of this trial; haven't you? A. Yes.

Q. And in this court house, this building, you carry on conversations with Mr. Rubelt?

A. Yes. [146]

Q. You carry on conversations with him in the hall out here? A. Yeah.

(Testimony of Leonadro Totorica.)

Q. Court room hall? A. Yeah.

Q. And carried on conversations with him here in the court room, haven't you? A. Yes.

Q. He is not what you would call deaf, he is just a little hard of hearing? A. Huh, huh.

Q. And is still a man of remarkable mental ability for his age; isn't he?

A. Yeah, for his age.

Q. He is able to comprehend what you state to him in conversations?

A. Well, I wouldn't know that.

Q. You wouldn't know that? A. No.

Q. But you do carry on the conversations with him? A. Yes, I carry on conversations.

Q. He is not insane, is he? A. What?

Q. He is not an insane man?

A. No. [147]

Q. Not by any means. He was able out there on the ranch during the last years he was there to fully take care of his business, wasn't he?

A. Well, I wouldn't know about that either.

Q. You don't know about that?

A. No, I don't know about that.

Q. You know he was there taking care of it, don't you? A. He was there, yes.

### Redirect Examination

Q. (By Mr. Greenfield): You have known Mr. Rubelt many years?

A. Yes, I have known him many years.

Q. Since starting in 1949 or 1950 and up to the

(Testimony of Leonadro Totorica.)

present time do you think he is as mentally alert and understood as well as he used to be?

A. No, he isn't as capable as he used to be.

### Recross Examination

Q. (By Mr. Anderson): You remember Mr. Rubelt particularly as he is right at the present time, don't you? A. Yes.

Q. He has been getting a little older and his faculties have been giving some during the last five years, haven't they? A. Yes.

Q. He was a lot better five years ago then he is now, wasn't he? [148] A. I think he was.

Mr. Anderson: That is all.

Mr. Greenfield: That is all.

(The witness was excused.) [149]

### HERSCHEL DAVIDSON

called as a witness, being first duly sworn, testified as follows, upon

### Direct Examination

Q. (By Mr. Greenfield): Will you state your name? A. Herschel Davidson.

Q. You live here in Boise? A. Yes.

Q. What is your occupation?

A. I am in the real estate business and appraiser for land.

Q. How long have you been so engaged?

A. Since 1935.

(Testimony of Herschel Davidson.)

Q. What has been some of your experience as a land appraiser?

A. I have appraised a lot of land for the Government for condemnation purposes. Cascade Reservoir, Anderson Reservoir, and something to do with Lucky Peak and so forth.

Q. Were you involved in the Strike Dam condemnation?      A. Yeah.

Q. And you appraised some ranch property in that condemnation proceedings?      A. Yes.

Q. That was in 1951, was it not?

A. 1951, yes.

Q. In the course of your experience over the last 20 years in appraising land as a part of that—a good part of it has been involved in appraising stock ranches? [150]

A. Part of it, some of it has been, yes.

Q. Have you had occasion from time to time to appraise the value of Federal grazing rights?

A. Not so much that, no, not appraising that, but only as it applies in the picture of a—

Q. You have had experience in arriving at the value of Federal grazing rights as it applies to appraising of the property?      A. Yes.

Q. Are you familiar with the range area in the neighborhood of Riddle?      A. Yes.

Q. Now in the neighborhood of 1950, Mr. Davidson, did you have occasion to be familiar with the value of Federal range rights in that area?

A. Yes.

Q. Are you familiar with the purchase and sale

(Testimony of Herschel Davidson.)

of Federal range rights in that neighborhood about that time?

A. You mean just the Federal range by itself, or as it applies to a unit?

Q. Is valuation placed on Federal range rights on the sale of ranch property?

A. It would be pretty hard to say when a ranch out there is sold for so much money, just how much of that is Federal range and how much is other.

Q. But Federal range rights are transferable; aren't they? [151]            A. Yes.

Q. They are transferable?            A. Yes.

Q. They are negotiable?            A. Yes.

Q. They have a value by themselves?

A. Yes.

Q. Are you familiar with the value of Federal range rights in 1950 within that area?

A. Yes.

Q. Now will you state to the Court your opinion of the value of Federal range rights, Grazing 1 right, in 1950, in the area we are talking about?

Mr. Anderson: Object on the ground that is incompetent and irrelevant in this hearing, and not within the issues of this case. The witness has not been properly qualified.

The Court: He may testify.

Q. What then, Mr. Davidson, in your opinion was the value of range rights at that time?

A. I would say at that time in 1950 the range rights for Federal range were sold at quite a wide variation.

(Testimony of Herschel Davidson.)

Q. What would you consider a minimum figure?

A. Well, I had known some that sold for as little as \$80, and some for \$175. [152]

Q. What do you think the fair market value was on them at that time?

A. Well, it's pretty hard to just say what is the fair market value unless it is pinned to a certain ranch and you investigate it, but probably around \$125 to \$150.

### Cross Examination

Q. (By Mr. Anderson): I take it, Mr. Davidson, you have not been out on the Rubelt ranch?

A. I have been past it, Gene, I know where it is but I have never looked at it. I have not been over that ranch, just past along the road and saw it off the—off down the field.

Q. Of a ranch like that is of practically no value without a range right, is it?

A. The value of that range depends upon how many cattle you can carry. The value of the ranch depends upon the ability to raise feed, to feed the cattle through the balance when there is no range. The ranch depends upon its ability to produce feed when there is no feed on the range, so there you are.

Q. Then would you say that the value of the Rubelt ranch depends upon the probable range?

A. Yes, it does.

Q. You say you are familiar with the range in



(Testimony of Herschel Davidson.)

that area; that is a high rim rock country up there, isn't it?

A. It is a good range country. [153]

Q. Well, now tell me this, that is rim rock country, isn't it?

A. Yes, rim rock plateaus, it has valleys, deep canyons, sure. Some of it is rocky, awful rocky.

Q. Do you think you would recognize the house at the Rubelt place?

A. I doubt very seriously whether I would because, as I say, I never was right up to it, just off down along the road.

Q. How far beyond the Rubelt place did you go on that road, Mr. Davidson?

A. In miles or in time?

Q. In miles?

A. You can measure distance over there in time about as well as you can miles.

Q. How far did you go on the road, as you recall?

A. We climbed through Big Springs and the Wickahoney country, somewhere in between there we passed the place, and it was just casually called to my attention that was the Rubelt place.

Q. Do you think the Rubelt ranch is on the range from Big Springs to—Big Springs to Wickahoney?

A. I don't know if it is or not, but in that area. I was all over that country.

Q. When was that?

A. 1951. I went out to Riddle.

(Testimony of Herschel Davidson.)

Q. What is the name of the area out around where the Rubelt place is, if you know? [154]

A. I don't know.

Q. Never heard of it that you recall?

A. Probably have, yeah, I have heard of it.

Q. What is it?

A. I couldn't tell you. I don't know.

Q. Was that name Yatahoney?

A. Wickahoney.

Q. Wickahoney was the name you have in mind?

A. Yes.

Q. That is the place where you were?

A. Yeah, I have been there.

Q. Wickahoney?            A. That is right.

Mr. Greenfield: Object to this line of questioning. The witness never testified he was familiar with the ranch. Immaterial whether he was or wasn't.

The Court: I believe he testified he was familiar with the country around there.

Q. Now it is the Wickahoney area where you were?

A. I have been all over that country.

Q. Have you ever been in the Yatahoney area?

A. Yes, it is all the same country.

Q. The Yatahoney and the Wickahoney you think are the same country?

A. Very similar.

Q. What do you mean similar, you mean they are in the same [155] place?

A. No, I mean similar in terrain.

(Testimony of Herschel Davidson.)

Q. When were you in the Yatahoney country?

A. The same period.

Q. Where is the Yatahoney country?

A. It is in Owyhee County.

Q. Where in Owyhee County?

A. Southeast, southerly portion.

Q. Where in the southerly portion?

A. I don't know. You are looking at the map and I haven't got it.

Q. I am not looking at it?

A. Well, it would be south and east of the Big Springs country, of course.

Q. Mr. Davidson, I think you testified that many things go into the value of stock ranches or grazing rights?      A. Yes, they do.

Q. The depth of the snow and the length of the winter feeding season goes into the value, doesn't it?

A. The length of the period, yes, has a very definite basis of value—the feeding period.

Q. Now the feeding season out in the area of the Rubelt ranch, the Riddle area, is how long? Five months?

A. No, I wouldn't think it would be five months.

Q. How long would you say?

A. It would depend upon your snow, Gene, in that area. [156]

Q. That country has an average of three feet of snow, doesn't it? Some years more and some years less?

A. Some years it does have and some years it don't. Sometimes doesn't have hardly any.

(Testimony of Herschel Davidson.)

Q. Can you tell us anything about the elevation of that country, the sea level?

A. It is close to a mile.

Q. You mean 5,280 feet high? A. Yes.

Q. More or less than that?

A. I don't know. I don't know just exactly what the elevation is, but in that country it is close to it. It would be near in that neighborhood of 5,000 feet, yeah.

Q. And of course the accessibility to a ranch or range is another item to be taken into consideration in fixing value, isn't it?

A. That hasn't got the impart on the value of a stock ranch that it does on other type of ranch property.

Q. But it is an item you take into consideration?

A. Doesn't have much bearing on the valuation of a ranch.

Q. But it does bear on the value, doesn't it?

A. Has some bearing on the value possibly, but the value of the stock ranch is not as dependent upon location as other ranches for the simple reason that by the virtue of the nature of the business people expect to find them in isolated and desire to have them there. [157]

Q. You wouldn't value a ranch in the Bruneau Valley the same as you would a ranch out here where the Rubelt place is, would you, if they were the same acreage?

A. Well, no, of course not.

(Testimony of Herschel Davidson.)

Q. The Bruneau Valley would be worth much more, wouldn't it?

A. In that area most of the people that have ranches have their ranches in the Bruneau Valley, and they may extend clear back into Nevada.

Q. You mean some of the sheep ranches do?

A. Yes.

Q. What kind of ranches extend out into Nevada?

A. I couldn't say, but recall—well, out to the Nevada line, let's put it that way if you want to get technical.

Q. The location does go into value, doesn't it?

A. Location goes into value of course, but it is——

Q. Mountain Home is the nearest railroad point to the Rubelt ranch, isn't it?      A. Yes.

Q. How far is it from Mountain Home to Riddle?      A. About 80 miles.

Q. How far is it from Riddle to the Rubelt ranch?      A. I don't know.

Q. You travelled that road, what was its condition when you travelled it in 1951?

A. Rough. [158]

Q. What do you mean rough?

A. Narrow, rocky road.

Q. As a matter of fact, there was no road there, just trail out through the desert there, wasn't it?

A. Yes. You couldn't get in only with a pickup, I think anything slower than a pickup you would be in a bad fix.

(Testimony of Herschel Davidson.)

Q. Of course, the range loss in some areas is another item that is taken into consideration in fixing value, normal operating range loss?

A. Range loss, sure.

Q. In areas where the range loss is comparatively high, then range rights are worth much less than where the range loss is lower?

A. Water supply and periods the range is available.

Q. Let's take a range loss; that makes a difference in value too, doesn't it?

A. Yes, it would if it was——

Q. Some areas have a greater normal operating range loss than others?

A. That would be true.

Q. You made one answer that intrigued me. Are you familiar with grazing rights, Taylor grazing rights? A. Yes.

Q. And aren't Taylor grazing rights always attached to land?

A. That is right, they are acquired. [159] Taylor grazing rights are acquired by proof, originally anyway, proof of use.

Q. Stay with my question. They are attached to land, aren't they?

A. Yes, they are attached to land.

Q. And are transferable with the land, and only with the land?

A. That has been my understanding, yes.

Q. And are not transferable separate and apart from the land as distinguished from forest rights?

(Testimony of Herschel Davidson.)

A. That is my understanding. Forest rights pass with the cattle and Taylor rights pass with the land.

Q. But may be transferred by an owner from one piece of land to the other if the land will qualify as commensurate property?

A. That's right.

Q. But otherwise they are not transferable?

A. It has to be done through your range set up.

Q. But otherwise they are not transferable?

A. That is right.

#### Redirect Examination

Q. (By Mr. Greenfield): With the authority of the grazing, Taylor grazing, it is possible, isn't it, to actually sell a Taylor grazing right to someone else if he has base property that is commensurate to which it is attached?

Mr. Anderson: Object on the ground it calls [160] for a conclusion of the witness. I don't think it is a fact anyway.

The Court: I think you went into that a little bit. He may answer.

A. Yes. That is the same question. One fellow asked it one way and the other, the other.

#### Recross Examination

Q. (By Mr. Anderson): You mean to tell me from the witness stand that a man can transfer a grazing right separate from the land to which it is attached?

A. By permission of his—if he has got some

(Testimony of Herschel Davidson.)

other land it can be attached to, yes, by permission of the Board.

Q. The same owner when transferred from one portion of his land to another piece of his land?

A. Yes.

Q. That is the limit to his right of transfer?

A. I don't know whether it has to be his land or not, but one piece of land to another piece of land regardless of ownership may be transferred.

(The witness was excused.)

The Court: We will take a short recess. [161]

### EDWIN NEWELL

called as a witness, having been first duly sworn, testified as follows, upon

#### Direct Examination

Q. (By Mr. Greenfield): State your name, please? A. Edwin L. Newell.

Q. Where do you reside?

A. Emmett, Idaho.

Q. Mr. Newell, what occupation do you engage in? A. I am a farmer and cattle man.

Q. How long have you been engaged in the cattle ranching business?

A. Well, Idaho about 37 or 38 years.

Q. And before you came to Idaho you were in the stock business elsewhere?

A. Yes, I was in the stock business in eastern Oregon.

Q. Have you had any experience in appraising



(Testimony of Edwin Newell.)

land property? A. Yes.

Q. What has been that experience?

A. Well, I have appraised land for different agencies. I appraised land for the Bureau of Reclamation, appraised some land for the Idaho Power on the C. J. Strike dam. I have appraised land for the army engineers and other agencies.

Q. Over how long a period have you engaged in appraisal work? [162]

A. Well, my first real appraisal work was in 1940, I believe.

Q. Now in the course of your experience as an appraiser of real property, have you had experience in appraising stock ranches? A. Yes.

Q. And have you had occasion to become familiar with the value of Federal range rights under Taylor grazing? A. Yes.

Q. Now in 1951, Mr. Newell, did you have occasion to do some appraisal work in connection with the C. J. Strike condemnation? A. Yes.

Q. During that period did you and a Mr. Herschel Davidson together travel through the country south of Bruneau?

A. Yes, I believe it was there.

Q. Evaluating the range? A. Yes.

Q. And cattle property through there?

A. Yeah.

Q. Are you generally acquainted with the character and quality of the range land in the area south of Bruneau and on down to Riddle, Idaho?

A. My only experience in there was when I was

(Testimony of Edwin Newell.)

on the C. J. Strike appraisal, and we covered that country in south of Bruneau pretty generally. [163]

Q. You examined the range land?

A. Yes.

Q. Do you think that you are familiar with the value of Federal range rights under the Taylor grazing in that area in 1950 to 1951, around that period?

A. Yes, I think so.

Q. Will you state what in your opinion was the per unit value of a Federal range right under Taylor grazing for seven months of summer?

Mr. Anderson: May I inquire in aid of an objection.

The Court: You may.

Q. (By Mr. Anderson): Mr. Newell, in appraising range properties to which are attached grazing rights, the grazing rights are just one of the items that is taken into consideration in fixing the value of the property, isn't it?

A. If I understand—I don't quite understand.

Q. In other words, when you appraise a live-stock ranch you take into consideration the grazing rights in arriving at the value of the ranch; don't you?

A. Well, if I was appraising a ranch I would, yes, but I have known of grazing rights being transferred without transfer of real property. I don't want to get mixed up on the question.

Q. Let's stay with the question here. The grazing rights are just one of the things to be taken

(Testimony of Edwin Newell.)

into consideration in fixing the value of a ranch, isn't it? [164]           A. Yes.

Q. And the value of any grazing right depends considerably upon a ranch as commensurate property, doesn't it?

A. Yes, I think it would.

Mr. Anderson: We object on the ground it is incompetent, irrelevant and immaterial. The question here is the value of this ranch with the grazing rights attached, not the separate value of any item but the whole value.

(Argument followed.)

The Court: So far I don't think the proper foundation has been laid for him to answer questions as to the value of grazing.

Q. (By Mr. Greenfield): Mr. Newell, we are concerned here with the value of certain grazing rights attached to a place known as the old Rubelt place, 17 miles from Riddle, Idaho, and about 80 miles south of Mountain Home. The testimony has been that the ranch carries a 475 head Class 1 Taylor grazing right, for approximately seven months a year summer grazing. The range land is in the area south of Bruneau, between Bruneau and Riddle, Idaho, over which you and Mr. Davidson stated you have travelled. The range to which these rights are attached raises 325 ton to 350 ton of hay. The range has certain deeded land with state land lease rentals attached to it; based upon that information and considering the area in which these rights lie; [165] what is your opinion as to

(Testimony of Edwin Newell.)

the value of the grazing rights per unit in 1950?

Mr. Anderson: Object upon the ground that the witness has not been properly qualified, that the proper foundation has not been laid.

The Court: I think the question is premature. The objection will be sustained. He didn't say he had an opinion as yet.

Q. Based on those facts, do you have an opinion as to the value of the range rights involved here per unit?

A. Yes, on the—based on the facts you have given me I would.

Q. Now will you state what that value was in 1950?

Mr. Anderson: Object on the ground the proper foundation has not been laid. The witness has not been properly qualified, and it is incompetent, irrelevant and immaterial.

The Court: I think he may answer.

Q. What value would you place on it, Mr. Newell?

A. About \$150 per unit.

Mr. Greenfield: You may cross examine.

### Cross Examination

Q. (By Mr. Anderson): Mr. Newell, do you know where the Rubelt ranch is?

A. No, sir, no more than what has been explained to me here this morning. [166]

Q. Just purely hearsay with you?

A. Yes, I haven't been on the place.

(Testimony of Edwin Newell.)

Q. Do you know where the range with that ranch is situated?

A. Not any more than what has been described to me.

Q. Well, separate and apart from the question here you have no other information, have you?

A. I have been in that general area that covered the Grassmere and Wickahoney area.

Q. You have been in the Wickahoney area?

A. Yes.

Q. You have been in the Grassmere area?

A. Yes.

Q. But not, not at the Rubelt area?

A. Not that I know of. I don't recognize that name or ever having been there.

Q. Do you know how far the area where the Rubelt ranches are is from the Wickahoney?

A. Just what I have been told.

Q. Just what you have been told?

A. Yes, about 15 or 20 miles.

Q. You were told that in the courtroom here?

A. Yeah.

Q. Is that by road or as the crow flies?

A. I don't know.

Q. Who told you that?

A. Well, let's see, George Greenfield and this gentleman [167] sitting here by him.

Q. Mr. Smith told you that?

A. (No answer.)

Q. Of course, it wasn't your practice to appraise

(Testimony of Edwin Newell.)

ranches by what you call animal units until after these Idaho Power cases in 1951, was it?

A. Well, I had appraised a great many places with grazing rights attached prior to that.

Q. Yes, but you just appraised the ranch and took into consideration grazing rights?

A. I think the Idaho Power case was the first case I definitely tied it to animal units and used that system.

Q. And you didn't do it in that case, did you?

A. Yes, if I remember right I did, Gene.

Q. Now, Todd, there is a lot of things that go into the value of grazing land? A. Yes.

Q. One of the things is the feeding season on a range to which it is commensurate, isn't it?

A. Yes.

Q. Do you know what the feeding season is out at the Rubelt ranch? A. No, I don't.

Q. Do you know what the elevation there is?

A. No. [168]

Q. Do you know what the snow fall in that area is? A. No.

Q. That goes into the evaluation too, doesn't it?

A. Yes, it would. Now generally speaking, as I was over that area and I have heard the testimony of interested parties, and I have got a pretty good idea.

Q. Over what area, Todd?

A. Well, the desert area south of Bruneau. It was covered by Mr. Watts' and Mr. Black's ranches.

Q. And that is the area you were over?

(Testimony of Edwin Newell.)

A. Yes.

Q. Do you know the nature of the range on the Rubelt area?

A. Only what I have been told.

Q. Only what you have been told?

A. Yes.

Q. Do you know the name of that area out there, range area? A. No.

Q. That is desert country out there, isn't it?

A. Yes, it would be.

Q. And it is rim rock country, desert and rim rock, pretty rough, isn't it?

A. Well, the place I was over was, yes.

Q. Awfully rough? A. Yes. [169]

Q. By rough you mean it has deep, rough, dry canyons with rim rock and rocky plateaus, doesn't it?

A. Yes, it is a flat desert area with some canyons and some rocks.

Q. The further south you go into that area the worse it becomes; is that right?

A. Well, I don't know. I couldn't say about that.

Q. Accessibility of a ranch with grazing rights, isn't that a matter to take into consideration in fixing value, isn't it? A. Yes.

Q. Do you know how far it is to the Rubelt ranch from Mountain Home, the nearest railroad point? A. No, I wouldn't know exactly.

Q. Do you know how far it is to Riddle?

A. No, I never kept track of the miles even when I—at the time I was in that county I did know

(Testimony of Edwin Newell.)

the miles to places I was to, but I have forgotten, Gene.

Q. From Mr. Greenfield's question to you did you assume that the Rubelt ranch was on the road from Mountain Home?— From Mountain Home to Riddle?

A. No, I didn't exactly assume that.

Q. Did you assume it was between Mountain Home and Riddle, that is what was stated in the question?

A. I assumed it was near Riddle, somewhere beyond Grassmere. [170]

Q. You don't know how far it is from Riddle or in which direction?      A. No, I don't.

Q. Todd, where the average snowfall is three feet in the winter——

Mr. Greenfield: I object to that, your Honor. I don't think anybody testified there was three feet of snow out there.

The Court: Doesn't have to, it is a hypothetical question.

Mr. Greenfield: A hypothetical question has to be based upon a statement in evidence.

Mr. Anderson: There has been testimony that the average is about three feet, even Mr. Rubelt's deposition said that.

Q. (By Mr. Anderson): Where the average snowfall is about three feet, and the elevation is a mile high, the average feeding season is about four and a half to five months?

A. If the area was a mile high, you say?



(Testimony of Edwin Newell.)

Q. Snow about three feet deep on the average?

A. I don't know about that area, but the areas I do know about five and a half to six months grazing season in that elevation.

Q. That is the feeding season in the winter. How much hay does it take to carry a cow through such a feeding season? [171]

A. Well, maybe I got that wrong. Did you say feeding season?

Q. Yes.

A. I was talking about grazing season.

Q. I see. Let's go to feeding season?

A. That's pretty high there——

Q. Can you tell us?

A. Well, that might depend on some conditions, Gene, that I hate to answer. Now you mean if all the area was a mile high, there was no draws or low places or places where there would be feed available?

Q. I mean the feeding season in the rim rock area about a mile high?

A. Well, I would say if the whole area was a mile high, and there was no lower places where cattle might get and graze, that would be a five month's season.

Q. How much hay does it take to winter an animal in such country, a grown animal?

A. Well, that depends again too on the type of hay you have.

Q. We will take say native grass hay, some timothy and clover?

(Testimony of Edwin Newell.)

A. I imagine about a ton and a quarter.

Q. To winter each animal? A. Yes.

Q. The range properties that produce the hay in a cow ranch with grazing rights is known as commensurate property, isn't it? [172]

A. Yes.

Q. And the commensurability or carrying capacity of the ranch lands that produces the hay goes into—is an item to take into consideration in fixing grazing rights, isn't it?

A. Well, the availability of water is, yes.

Mr. Anderson: That is all.

Mr. Greenfield: That is all. The plaintiff rests, your Honor. [173]

Mr. Kaufman: We have several motions at this time that we would like to make.

The Court: Very well.

Mr. Kaufman: Come now the defendants in this action and move that Paragraph III of the further and separate defense asserted in their answer, appearing on Page 4 of the answer, be amended to conform to the proof adduced here, in that Paragraph III as amended then will read as follows: That by reason of the premises the plaintiff is estopped by laches from asserting at this time the claims set forth in his complaint, and that the said claim of the plaintiff is barred by the provisions of the Idaho Code 5-218, Subsection 4. The portion that I added there is the last part of the sentence, "and that the said claim of the plaintiff is barred by the provisions of the Idaho Code 5-218, Subsec-

(Testimony of Edwin Newell.)

tion 4." That is the statute of limitations pertaining to fraud.

The Court: Have you anything to state?

Mr. Greenfield: Object to that on the ground it is untimely and not authorized, or in accordance with the Federal Rules of Civil Procedure, and on the further ground that provisions in paragraphs and answers are not to be amended during the trial since all of the facts upon which the answer is based are available by discovery procedure to the defendant prior to trial. [174]

The Court: The motion will be granted.

Mr. Kaufman: The second motion is: Comes now the defendants and move for a dismissal of the plaintiff's cause of action on the ground that upon the facts and the law the plaintiff has shown no right to relief as prayed for in his complaint.

(Argument followed on motion.)

The Court: Are those the only motions you have?

Mr. Kaufman: Yes.

The Court: I am going to take it under advisement until two o'clock this afternoon.

(Whereupon, recess was taken at 11:35 a.m., until 2:00 p.m.)

After recess, 2:00 p.m.

The Court: During the noon recess, gentlemen, I have considered the pleadings in this case and also reviewed the evidence, and the Court has come to the conclusion that the proof has failed to establish the allegations in the complaint. First, there is

(Testimony of Edwin Newell.)

a vital issue of jurisdiction raised by the answer which was not proved. There is no evidence of any diversity of citizenship with reference to one of the defendants, no evidence whatsoever. Secondly, the proof utterly fails in my opinion to show any fraud on the part of the defendants. Giving the evidence of the plaintiff [175] all the weight that can be given, about all that it shows is that the plaintiff was an old man, that his hearing was a little impaired, and perhaps could not see as good as he might have in his earlier days, but there is no testimony that he was incompetent to transact business. As a matter of fact, the evidence shows that the parties went to the offices of an attorney in Mountain Home where the lease and option were prepared. There is no evidence that that attorney was the attorney of the defendants. If the deposition which was read is given any weight, it shows conclusively that the attorney was the attorney of the plaintiff, and thereafter the plaintiff worked for the defendants on the ranch, and later amended his transaction by making an amendment to the lease and option, extending the time within which the option could be exercised. So, as I say, it appears to the Court that the evidence utterly fails to show any fraud or misrepresentations on the part of the defendant. Consequently, the motion to dismiss will be granted. Anything further? I think under the rules that Findings of Fact and Conclusions of Law must be prepared. The Court will adjourn.

[Endorsed]: Filed May 16, 1955.

[Title of District Court and Cause.]

PLAINTIFF'S EXHIBIT No. 3

DEPOSITION OF D. O. BYBEE

Be It Remembered that at 2:00 p.m. on Monday, 21 September 1953, at Suite 312, Continental Bank Building, Boise, Ada County, State of Idaho, pursuant to oral stipulation contained herein, the deposition of D. O. Bybee, one of the defendants herein, was taken before me, a Notary Public in and for the State of Idaho.

Appearances: George A. Greenfield, Attorney-at-Law, of Boise, Idaho, and Laurence N. Smith, Attorney-at-Law, of Boise, Idaho, appeared on behalf of the plaintiff. Eugene H. Anderson, Attorney-at-Law, of Boise, Idaho, and Samuel Kaufman, Jr., Attorney-at-Law, of Boise, Idaho, appeared on behalf of the defendants.

Whereupon, the following proceedings were had at the time and place aforesaid:

Mr. Greenfield: It is hereby stipulated and agreed by and between the parties hereto and their respective attorneys that the deposition of D. O. Bybee, one of the defendants in the above entitled action, may be taken upon oral examination before Frank J. Kester, a Notary Public in and for the State of Idaho, at the law office of George A. Greenfield, Suite 312, Continental Bank Building, Boise, Idaho, on Monday, the 21st day of September, 1953, beginning at the hour of 2:00 p.m.; that said deposition may be taken on oral interroga-

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

tories for the purpose of discovery or use as evidence by either party in the above styled cause, or for both purposes; that all formalities as to notice, taking, transcribing, signing, transmitting, and certification, other than as provided in this stipulation, and the signature of deponent, are hereby waived; but excepting as to the form of questions, any objections as to competency, relevancy, or materiality are hereby reserved and may be made at the time of trial.

Mr. Anderson: It is so stipulated.

D. O. BYBEE

one of the defendants herein, called as a witness by the plaintiff, and being first duly sworn, testified as follows, upon

Cross Examination Under the Statute

Q. (By Mr. Greenfield): Will you state your name, Mr. Bybee?      A. D. O. Bybee.

Q. Where do you now reside?

A. Well, I have two or three residences, I have one at Riddle, Idaho, one at Grandview, and one at Nyssa, Oregon.

Q. Which one do you consider your home?

A. Riddle, Idaho.

Q. Directing your attention to May 15, 1953, where were you physically living at that time?

A. Well, I may have been at Riddle, or—you mean that very day? I may have been at Riddle, or

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

I may have been at Nyssa, or I may have been at Grandview; I don't know.

Q. With regard to the year 1953, this year, what percentage of the time have you been physically present in Idaho, and what part in Oregon?

A. Well, I will just have to guess at that. I think I have been in Idaho probably twenty or thirty, maybe 35 per cent of the time.

Q. And the remainder of the time you have been in Oregon, principally Nyssa? A. Yes.

Q. When you are in Idaho where do you stay?

A. Well, I have a little ranch house at Shoofly, at Grandview, and mostly I stay at the ranch at Riddle.

Q. The ranch is the Rubelt place?

A. Yes.

Q. (By Mr. Greenfield): When you are staying at the Rubelt place, is there anyone else there?

A. Yes.

Q. Who else is there?

A. I have people working for me; Norman Cutler and his wife.

Q. And who else?

A. Different fellows who work for me.

Q. Mrs. Cutler does the cooking?

A. Yes.

Q. Do you pay her for it?

A. I just pay them a certain amount, between him and her; and haying time I expect to pay her extra.

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

Q. Do you pay her anything extra to cook for you when you are there?

A. Not necessarily.

Q. You have a room there in the ranch house?

A. Yes, sir.

Q. What personal effects do you have there at the ranch house, clothes and household goods and that sort of thing?

A. Just about the clothes I wear; I don't keep too many clothes there.

Q. Do your wife and children accompany you to Riddle when you go there?

A. Occasionally.

Q. Frequently, or not?

A. Quite infrequently.

Q. They normally remain at your residence in Nyssa? A. Yes, sir.

Q. (By Mr. Greenfield): During 1953 you state that you have spent from twenty to thirty per cent of your time in Idaho. Have there been months when you spent more of your time here than other months? A. Well, I think so.

Q. What months do you think you were here for a longer period of time than other months?

A. Well, I haven't kept track at all, but I am not here what you would call steady, and I am not there what you would call steady; I just come over here to do my business, and I haven't kept track of it one way or the other.

Q. Your principal business in coming to Idaho



Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

is to transact your ranching business, and when you are through with it you go back to Nyssa?

A. Yes.

Q. Do you stay on your ranch at Riddle weeks at a time, or do you go home on week-ends?

A. I generally go home on week-ends, to Nyssa.

Q. In answer to Interrogatory No. 2 propounded by the plaintiffs you stated that in 1951 you registered to vote in the State of Idaho at Riddle, Idaho, and in 1952 you voted in the general election at Riddle, Idaho. Will you state, if you can recall, about when in 1951 you registered to vote in the State of Idaho?

A. Well, I wouldn't know exactly what time that was. I was down there, and they were registering, and I said, "Well, I think that I have stayed here long enough I have become a resident," and I wanted to become a part of those people down there, and I don't know when I registered. I suppose that could be found on the books.

Q. (By Mr. Greenfield): Was that some time during the summer?           A. Yes, sir.

Q. Was it prior to the 1st of September?

A. I think it was.

Q. Now, you state in answer to the Interrogatory that you have been a resident of the State of Oregon, you had been a resident of the State of Oregon up to about May 15th. So it was only two or three months after you—according to your own

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

statement—ceased to be a resident in Oregon that you registered to vote in Idaho?

Mr. Anderson: I think, Mr. Greenfield, that is patently an error there, and that registration was made during the election year.

(Discussion of counsel, off the record.)

Mr. Anderson: Did you register last year, or the year before?

The Witness: Last year.

Mr. Anderson: Then your answer to Interrogatory No. 2 should have read that you registered to vote in the State of Idaho in the summer of 1952, and not 1951?

The Witness: I think that would have been correct.

Mr. Anderson: That's very well. I just wanted to know.

Q. (By Mr. Greenfield): Do you hunt and fish, Mr. Bybee?      A. Very little.

Q. Do you purchase hunting and fishing licenses?

A. No. Sometimes I do; not very often.

Q. (By Mr. Greenfield): Did you purchase a hunting and fishing license this year?

A. No, sir.

Q. Last year, 1952?

A. Not that I remember. A year or so ago I got a license in Oregon, but I do very little hunting and fishing.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Q. You think you got an Oregon hunting and fishing license in 1951?

A. I think it would have been 1951. I lived down there. I couldn't say for sure. I have gotten about one or two licenses since I came up here, thirteen years.

Q. You have never purchased an out-of-state hunting and fishing license?      A. No, sir.

Q. Any hunting and fishing license you purchased in Oregon, you purchased as an Oregon resident?      A. Yes, sir.

Q. Since May 1, 1951, Mr. Bybee, have you made any financial statements to any lending companies for the purpose of obtaining credit, in which you stated a residence?

A. Well, I think I have.

Q. To whom have you made those financial statements?

A. This Boise Real Estate and Loan, I obtained some money from them, and I must have.

Q. About when was that?

A. About a year ago.

Q. That would have been in the fall of 1952?

Mr. Anderson: Spring of 1952.

Q. (By Mr. Greenfield): In the spring of 1952?

A. Yes.

Q. Do you recall, on that statement, whether or not you listed a place of residence?

A. I don't remember.

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

Q. (By Mr. Greenfield): You may have?

A. I may have; I don't remember.

Q. Could you produce a copy of that application, or authorize its inspection?

A. If you can find it.

Q. Is it satisfactory with you, and do you authorize us to inspect the financial statement you made the Boise Loan and Realty, for the purpose of determining whether or not a place of residence is stated?

Mr. Anderson: No, that has other evidence on it that has no concern to you, and there are many other avenues through which you can obtain the information you seek.

Mr. Greenfield: The record shows, then, that the defendants——

Mr. Anderson: (interposing) ——do not authorize you to inspect the application for a loan from the Utah Mortgage Company in the spring of 1952.

Mr. Greenfield: And you likewise refuse to provide a copy of it?

Mr. Anderson: We do not have a copy of it.

Q. (By Mr. Greenfield): Have you applied for any life insurance, Mr. Bybee, since May of 1951?

A. I think so.

Q. On those applications have you stated a place of residence?

A. Well, I don't think I did. The fellow came to my place in Nyssa, and wrote me up some insurance there.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Q. (By Mr. Greenfield): What company was it?  
A. The Beneficial.

Q. And you don't know whether or not the application showed your place of residence?

A. I don't remember answering that question.

Q. Do you know who the agent was?

A. Ronald—I don't recall, now.

Q. You may think of that, a little later?

A. Yes. I know him very well, and I should think of his name.

Q. Do you possess a driver's license, Mr. Bybee?  
A. Yes, sir.

Q. Do you have it with you?           A. Yes, sir.

Q. May I see it?

A. (Witness produces a document from wallet.)

Q. Your driver's license which you have handed me, Mr. Bybee, is dated March 12, 1952, expiring April 9, 1954, and gives your address as Route 2, Nyssa, Oregon. I will ask you if that is the home address which you gave to the Law Enforcement officers of the State of Oregon when you purchased your license in March, 1952?

A. That is the renewal; you have to renew those every two years.

Q. You are aware of the fact that you are required to give to the Law Enforcement officials any change of residence when you renew a license?

Mr. Anderson: We object to that as incompetent, irrelevant, and immaterial.

(Deposition of D. O. Bybee.)

Plaintiff's Exhibit No. 3—(Continued)

Mr. Greenfield: You refuse to let the witness answer that question?

Mr. Anderson: We refuse to answer that question.

Q. (By Mr. Greenfield): You did not give any change of address to the Law Enforcement people when you renewed your license in March, 1952?

Mr. Anderson: We refuse to answer that.

Q. (By Mr. Greenfield): Mr. Bybee, do I understand that you desire to correct your reply to Plaintiffs' Interrogatory No. 1?

Mr. Anderson: No, we do not desire to change the answer to that.

Q. (By Mr. Greenfield): Mr. Bybee, do you still state that your place of residence on May 1, 1951, or about that time, changed from Oregon to Idaho?

A. Well, these dates—I have never kept any track of any dates or anything. I think it was the spring of '52, but I have lived down there off and on all the time since I got that place, and I moved down there in the spring of '52.

Q. Then a statement that you were a resident of Idaho ever since May 1, '51, is not correct?

A. Well, I haven't said that I lived there continuously since May 1, 1951.

Q. Have you ever stated that you were a resident of Idaho, have been a resident of Idaho, ever since May 1, 1951, Mr. Bybee? A. No.

Mr. Anderson: This is a damnably unfair type

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

of examination, and you know it! Show the gentleman the statement.

Mr. Greenfield: I assumed he has read it, signed it, and sworn to it.

Mr. Anderson: He has read it, but his memory is probably no better than yours is.

Q. (By Mr. Greenfield, handing document to witness): Is that answer true or false?

A. Sir, ever since I have got that ranch I have spent every minute of my time down there that I could spare, because my interests are down there. The dates I never kept any track of, because I never knew anything like this was coming up, and all I have had in mind was putting over these projects herein Idaho. Now, if I don't remember those dates, I don't remember them.

Q. Would you say the answer to Interrogatory No. 1 which you just read is true or not?

A. Oh, I think that's true, as much as—as far as I know the dates on that.

Q. So, in answer to the Interrogatories, you stated and you now stated that you have lived in Idaho ever since May 1, 1951; is that correct?

Mr. Anderson: I think the Interrogatory says "about that time." A. Just as I told you.

Q. (By Mr. Greenfield): Now, referring to your driver's license, which lists your address as Nyssa, Oregon, which you acquired in March, 1952: In March, 1952, you did not advise the Law Enforce-

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)  
ment officers of Oregon that your residence had changed?

Mr. Anderson: We object to the form of your question.

A. As I remember, sir, all I did was send in and have my license renewed.

Q. (By Mr. Greenfield): Have you ever applied for or purchased an Idaho driver's license?

A. No, sir.

Q. Where do you do your banking, Mr. Bybee?

A. Nyssa, Oregon.

Q. You have banked there for years?

A. More recently I have done some financing through the P. C. A. at Ontario.

Q. Have you made any statements to the Production Credit Administration or the Ontario bank, as to place of residence, in applying for loans?

A. Not that I know of. There may have been in that. They know all of my operations.

Q. In reply to Plaintiffs' Interrogatory No. 3, you stated that your Federal and State income tax for 1952, prepared by an accountant in Ontario, Oregon, listed your place of residence as the State of Oregon. Did you ever inform your accountant of your purported change of address?

A. I don't remember whether I did or not. I don't remember him ever asking me.

Q. When he prepared your Federal income tax return for 1952, did you go over it with him before you signed it?



Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

A. Not too thoroughly. I gave him all the information I had. I don't understand those things too well, and do just about what he tells me to do, because I wouldn't understand it if I studied it.

Q. You would understand if the form listed Malheur County, Oregon, as your residence?

A. If I read it over, I would, yes, sir.

Q. (By Mr. Greenfield): Did you read it over before you signed it?      A. No, sir.

Q. Do you know where your Federal return for the calendar year '52 was filed, whether it was filed in Portland or in Boise?

A. I don't know. The bookkeepers took care of that.

Q. Did you file an Oregon State income tax return for the year 1952?

A. I suppose I did. They take care of all that.

Q. Do you know whether or not you paid any Oregon income tax?      A. Yes, sir.

Q. You did?      A. Yes, sir.

Q. Did you file an Idaho income tax return for 1952?      A. I think so.

Q. You may not have, or you may; you don't know?      A. Yes, I paid some taxes in Idaho.

Q. Do you own a private passenger car?

A. Yes, sir.

Q. What kind of car is it?      A. Packard.

Q. Where is it registered?      A. Oregon.

Q. Is that the automobile——?

A. (Interposing) That may not be true. Now,

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

I got that in Nampa, and I don't know whether that's going to be—he asked me where I wanted to register that, and he took it over and registered it in Oregon. I just had a wreck with the other car, and I haven't got the plates yet on this car.

Q. (By Mr. Greenfield): You purchased another car, in Nampa, and the dealer asked you where you wanted to register it, and reviewing the matter you decided to register it in Oregon?

Mr. Anderson: That isn't what he said.

Q. (By Mr. Greenfield): Is that the automobile you use to travel between Nyssa and Idaho, usually?

A. The old one, I did; this is the new one; and I use the jeep sometimes.

Q. This Packard is registered in your name in Oregon?      A. Yes.

Q. Do I understand, then, Mr. Bybee, that you have the great bulk of your personal effects, household goods, furniture, and personal belongings, at your Nyssa, Oregon, home?      A. Yes, sir.

Q. And as much time as you can spend away from your ranching activities in Idaho, you spend with your wife and family in Oregon?

A. Yes, sir.

Q. You have children in school?

A. Yes, sir.

Q. What ages are they?

A. One is nineteen, and one's twelve.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Q. The twelve-year-old child is enrolled in the public schools of the State of Oregon?

A. Yes, sir.

Q. Have you ever paid any out-of-state tuition for that child, or does the child go to school as a resident of the State of Oregon?

A. I think that's taken care of by the taxes I pay over there.

Q. (By Mr. Greenfield): You don't pay any out-of-state tuition as an Idaho resident would pay for a child he sends to school in Oregon?

A. No, sir.

Q. Do you consider that your wife and children are residents of the State of Oregon?

A. Yes, sir.

Q. Mr. Bybee, is W. A. Bybee your brother?

A. Yes, sir.

Q. You have business dealings with him?

A. Yes, sir.

Q. You are in business together in the State of Oregon?      A. Yes, sir.

Q. And you are in business together in Owyhee County, Idaho?      A. Yes, sir.

Q. What is the nature and type and extent of your business relations with your brother in Idaho?

A. Well, we leased the Rubelt ranch with the option of buying it, together; and also he and my brother-in-law purchased the Shoofly ranch in Grandview, together.

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

Q. You and your brother, W. A. Bybee, then, are full and equal partners in the Rubelt deal?

A. Yes, sir.

Q. And always have been? A. Yes, sir.

Q. When did you first meet Henry Rubelt?

A. Well, it was the spring of '50, I think, just a few days before this contract was drawn up.

Q. (By Mr. Greenfield): Where did you meet him? A. Out at his ranch.

Q. You had never met him previous to that?

A. No, sir.

Q. Prior to the time of seeing Mr. Rubelt for the first time, had you had any discussions with your brother, W. A. Bybee, regarding the acquisition of the Rubelt property? A. No, sir.

Q. You had never discussed it with W. A., prior to the time you went over to discuss it with Rubelt the first time? A. No, sir.

Q. Had you ever discussed it with anyone?

A. Yes, sir, there was a gentleman—I don't know his name. I was looking for a ranch, and I went to the Bruneau Bank and talked to—I suppose—the manager in there; I think it was Mr. Caldwell; at that time I didn't know him, but I had been told that that was his name. And I didn't get any encouragement about where I could buy a ranch. So I started out west. I came to the junction where it turns back to Grandview, and I—just before I got there I passed an old gentleman and his wife in a Model A car, and I stopped them and

## Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

talked to them a little while, and asked them if they knew where there was a ranch for sale, and they told me about the Rubelt ranch.

Q. What did they tell you?

A. They told me it was for sale, and they seemed to know something about it; they said it was for sale, and they suggested I talk to Mr. Ocamica about it; he was the son-in-law.

Q. (By Mr. Greenfield): What did you then do?

A. Well, I asked him about if he knew about that place, whether it was for sale, his father-in-law's place, and he said it was.

Q. This is Mr. Ocamica you are talking about now?

A. Yes, sir.

Q. What else did he say?

A. Well, of course I didn't want to—this other fellow told me it was a long ways out there, and I didn't want to drive out there unless I had a chance of buying it, or something, or leasing it or something, so I asked him as much as I could about the land and its possibilities, and the price of it.

Q. What did he tell you?

A. You mean about the price?

Q. Whatever he told you about the ranch.

A. I said, "How much does he want for the ranch?" So he told me this was a good grazing ranch and had two reservoirs on it. I asked him, "How much does your father-in-law want for it?" and he said he didn't know. And I said, "Do you

## Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

suppose he would want \$20,000.00 for it?" and he said, "More than that." And I kept raising. I said, "Twenty-five or thirty thousand dollars?" and he said, "More than that." And I said, "Do you suppose he would want \$40,000.00?" and he said, "I think something like that."

Q. Did you have any further conversations with Mr. Ocamica at that time?

A. No, I left, then, and I went up and started towards the ranch.

Q. When you arrived at Mr. Rubelt's ranch, who was present?

A. Of course at that time I didn't know who it was, but I know how it was Young Henry's wife, and Mr. Rubelt.

Q. (By Mr. Greenfield): Did you have any conversation with Mr. Rubelt then?

A. Well, first, Mrs. Rubelt came to the door.

Q. Young Henry's wife?

A. Yes. And I asked her if the place was for sale, and she said, "Well, the old man's in here, and you can ask him." And he came to the door about then, and I said, "Do you want to sell this ranch?"—or she said it—and immediately he said, "No," and walked kind of fast out of the door and out in the yard, and in a little while he came back and started in conversation, and he said, "Do you want to buy this ranch?" and I said, "Yes," and he said, "Let me show you around." So he took me—I got him in my car, and we went up to the first

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

reservoir, as close as we could. We had to walk quite a little ways, because the ground was wet. And he showed me the reservoir, and the amount of water they would hold, and then we came back down to the house. And then he wanted to show me the upper field and the upper reservoir, and the water was up too high to get over there in the car, so we walked up to the upper field; and he wanted to take me up to the upper reservoir at that time, but I told him I didn't have time. The old gentleman was a better walker than I was. He just about had me walked out, by that time. So we came back, and after a conversation about the ranch I told him I would go home and get my brother and come back out and look at the ranch.

Q. Did you then leave?

A. Yes, sir.

Q. (By Mr. Greenfield): On this first occasion when you talked to Mr. Rubelt, he appeared to be in good physical health?

A. I will say he did; he walked me up to the top of one reservoir, and up in the other field, and I could hardly walk when I got back.

Q. Did he appear to be mentally alert?

A. Yes, sir.

Q. You noticed no rambling in his conversation, or any indication of faulty memory, or anything like that?      A. No, sir.

Q. Did you notice whether or not he appeared to have good eyesight?

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

A. I think his eyesight is impaired.

Q. What caused you to come to that conclusion?

A. I asked him something about driving a car, and he said his eyesight wasn't good enough to drive a car, that he hadn't driven a car for a few years.

Q. Was there anything else that suggested to you that his eyesight was impaired, that you recall?

A. Well, I associated with the old gentleman quite a little after that, and I think he could just about read the headlines of the paper and that's all.

Q. Did you notice whether or not he appeared to be hard of hearing?

A. Well, sometimes Mr. Rubelt does act like he is a little hard of hearing, and other times he has very alert hearing. I think probably his hearing is pretty good.

Q. You think probably he just hears what he wants to?

A. Well, I don't know about that.

Q. (By Mr. Greenfield): After you left the Rubelt place that first time, where did you go?

A. Came home.

Q. Back to Nyssa?           A. Yes, sir.

Q. Did you stop anywhere along the way, do you recall, Mr. Bybee?

A. Oh, I think I stopped at Grassmere. I stopped at Grassmere going out, too, and asked the way out there, and asked what I could find out



Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

about the ranch; and I think I stopped coming back, too.

Q. Whom did you talk to at Grassmere, either time?

A. Well, a fellow by the name of Jack Thompson; in fact, I think both of the boys were there, Jack and the other one.

Q. So you talked to the two Thompson boys, both on the way in and the way out, probably?

A. I wouldn't say exactly. They were strange to me then. I talked to some people in there, and I later found out their name was Thompson. There was a lady in there by the name of Blanche.

Q. What did they tell you about the ranch?

A. They told me it was a good old ranch; it was isolated out there, but there was quite a lot of grass feed.

Q. When you left Grassmere, where did you go next?

A. I came through Boise, and on home.

Q. Did you come through Mountain Home at all, or did you come through the cut-off?

A. I think I came through Mountain Home; that's always the best route.

Q. Did you stop at Mountain Home at all?

A. Maybe for gas.

Q. (By Mr. Greenfield): You didn't discuss the ranch with anyone at Mountain Home, at all?

A. No.

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

Q. When you left Mountain Home, you went straight to Nyssa? A. Yes.

Q. And when you arrived at Nyssa, you discussed this ranch with your brother, W. A. Bybee?

A. Yes.

Q. What did you tell him about it?

A. I told him I thought it was a pretty good spread out there, if we could manage to swing the deal.

Q. When did you return to Idaho?

A. I think it was about two days later.

Q. And at that time did you then return to the ranch?

A. Yes, I took my brother out there.

Q. Now, between these two visits to the Rubelt ranch, did you discuss this pending deal with anyone besides your brother?

A. Yes, I had a fellow working for me by the name of Bud Keller, who had spent considerable time out in that country, and he told me about a fellow over here named Glenn Sebern that used to be a foreman on the U. D., and the U. D. is a ranch right close to it, and I called him up on the telephone and he told me about the ranch.

Q. What did he tell you about the ranch?

A. He told me it was a pretty good spread in there, that the water was kind of limited, but if a fellow could buy it right he thought it would be all right.

Q. (By Mr. Greenfield): Did you discuss the

## Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

pending Rubelt deal with anyone else other than the ones you have stated, during the period between your first and second visits?

A. Oh, I may have talked to my wife.

Q. Anyone else? Anyone outside the family?

A. No, only Mr. Sebern.

Q. On your return to the Rubelt place the second time, was there anyone with you?

A. Yes, my brother, W. A.

Q. And who was present on the ranch?

A. Mrs. Rubelt, and Mr. Rubelt, Sr. Young Henry was there, but he was operating a cat, a caterpillar tractor, and he had it stuck over where he was cleaning out a ditch, so the old man told me, and he was to the Flying H ranch to get another caterpillar to come over and pull him. I didn't see him.

Q. Were you aware at that time that Young Henry had a ranch over in Oregon that was taking up most of his time?

A. The only thing I knew about that ranch was that this first fellow told me down there—I asked him the question, why his boy didn't run it, and he said he had other ranches on farther over there.

Q. You were aware, however, that old Mr. Rubelt was alone on the ranch, operationally?

A. I knew nothing about who was operating the ranch, excepting I went out there and Young Henry's wife was there with her family; and later on when I was waiting for them to move out, Young

## Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Henry and his family were all there and I waited thirty or forty days for them to move out.

Q. Did you know old Mr. Rubelt was running the ranch alone, at the time you were negotiating with him?

A. I didn't know who was running it; I didn't know whether anybody was running it then.

Q. (By Mr. Greenfield): Now, when you went to the Rubelt ranch the second time, with your brother, W. A. Bybee, did you have a conversation again with Mr. Rubelt?           A. Yes, sir.

Q. What was said by you and your brother, and what by him?

A. When he priced the ranch to me, he wanted \$40,000.00 for it, and I didn't know whether it was worth \$40,000.00; I didn't think it was; it wasn't worth that to me at that time. And so I asked him if he would take less than that for the ranch at that time, and he said well, he didn't think he would. He kept holding for \$40,000.00, so I was about to leave, as near as I can remember; and so he said, "If you don't want to buy the ranch, I will lease it to you." And I said, "How much do you want to lease it?" And he said \$3,000.00. And I said, "Well, would you lease it to me with the option of applying the rent on the purchase price, in the event I decided to buy it?" And he said, "Yes," And I said, "Would you pay the taxes while I am leasing it?" And he said, "Yes." So after a con-

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

versation there for a while, we decided to go in and draw up the papers.

Q. You then left?           A. Yes, sir.

Q. In your car?           A. Yes, sir.

Q. And Mr. Rubelt with you?

A. Yes, sir.

Q. (By Mr. Greenfield): Where did you go then?           A. We went to Mountain Home.

Q. And when you arrived at Mountain Home, where did you go?

A. We went up to Mr. Hall—Perce Hall's office.

Q. What time did you arrive there?

A. It was quite late at night; it must have been around six o'clock, I think. I was surprised that the office was open.

Q. Was he there?

A. Mr. Rubelt went over and opened the door and walked in.

Q. Was Mr. Hall there?           A. Yes, sir.

Q. Had this matter ever to your knowledge been discussed with Mr. Hall, before then?

A. I had never seen Mr. Hall before, in my life.

Q. Now, how long did you stay in Mr. Hall's office?

A. Approximately a half an hour, I suppose.

Q. Did you explain to Mr. Hall what kind of a contract you and Mr. Rubelt wanted?

A. Yes, between us we did.

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

Mr. Anderson: You say, "between us." You mean——?

The Witness: Yes, between me and Mr. Rubelt.

Q. (By Mr. Greenfield): Who suggested going to Mr. Hall, in the first place?

A. Mr. Rubelt.

Q. What did he say?

A. I said, "Where can we go?" And he said, "Right up here."

Q. Who paid Mr. Hall for the work that he did?

A. As I remember, he charged us \$30.00, and we shared the expense, fifty per cent to him and fifty per cent to me.

Q. (By Mr. Greenfield): You each paid half?

A. Yes, sir, I think so, as I remember it. However, we didn't finish the contract then, sir.

Q. I gathered you didn't finish the contract that day. A. We didn't pay him anything.

Q. At that time? A. No.

Q. Did either of you go back and see Mr. Hall at a subsequent date?

A. I think it was not the next day, but I think it was about the second day, we made an appointment to meet Mr. Rubelt in the Mellen Hotel about one o'clock. And on the appointed day I went and waited for Mr. Rubelt quite a long while, and I decided he had missed the stage or something, and so I went up to Mr. Hall's to tell him Mr. Rubelt hadn't come in and I was going home, and Mr.

Plaintiff's Exhibit No. 3—(Continued)  
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Rubelt was in Mr. Hall's office talking to him. That was quite a surprise to me.

Q. Did you stay and talk with him there?

A. Yes.

Q. How long did you stay there?

A. Well, he had the contract drawn up there, and he read it to us and explained it to us as he went along. And we signed the contract there. Wait a minute—my brother wasn't there that time; I just came back alone.

Q. Did Mr. Hall read the lease in its entirety at that time?

A. Yes, sir, and he would read a ways and then he would explain as he went.

Q. (By Mr. Greenfield): Do you think that Mr. Rubelt at that time seemed to understand what was provided by the lease and option agreement?

A. Yes, sir.

Q. Did you know how much the taxes and state land lease rentals at that time would amount to, at that time?

A. No, sir.

Q. Or approximately?

A. No, sir.

Q. Was any figure suggested?

A. I don't remember asking him; inasmuch as he was going to pay them, I thought he would know, and I don't remember asking him.

Q. You don't have any idea how much they would amount to?

A. I didn't give them a thought, because I wasn't

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

going to have to pay them for a while, so I don't remember seriously considering them.

Q. What was the purchase price of the property, as you understood it to be?

A. He asked me \$40,000.00.

Q. And that is what you agreed to pay?

A. Well, I wanted to buy it for less, but when he told me the terms I could buy it on, I agreed to his terms.

Q. It was your understanding you were paying \$40,000.00?

A. That was the full purchase price—that was the full rental and purchase price, yes, sir.

Q. What, in your opinion, Mr. Bybee, was the fair rental value of that ranch on a yearly basis, as of April 15, 1950?

A. Well, sir, I was very limited in my capital, and if I got that ranch I wouldn't be able to fully operate it. That is as much as I would have given him or anyone else for the ranch, under the circumstances.

Q. (By Mr. Greenfield): Apart from your own financial limitations, do you have an opinion as to the fair rental value of that property, at that time, on a yearly basis?

A. I wouldn't give any more for it now.

Q. More than what a year? A. \$3,000.00.

Q. Are you referring to its rental value as of the present time?



Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

A. Well, at the time I rented it, sir, or now,—either.

Q. If you were in your present financial position and renting it in April, 1950, you would still believe that the fair rental value of the place was about \$3,000.00 a year? A. Yes, sir.

Q. How do you arrive at that figure?

A. Well, I have operated out there for this many years, and it is very difficult out there—it's very difficult to hire a competent man to go out there and stay. It's very remote.

Q. If we assume, Mr. Bybee, that the taxes and state land lease rentals on the place run \$800.00 a year, would you then believe that \$2,200.00 a year would be a fair rental value?

A. I think that's as much good as it has done me, if that will answer your question.

Q. Were you familiar with the Taylor Grazing rights that are appurtenant with and attaching to the property?

A. I knew not too much about it at that time. I am a little familiar now.

Q. (By Mr. Greenfield): Did you know he had a ten-year grazing permit for 475 head of livestock?

A. He told me he had a Taylor Grazing right for 450 cattle and 25 horses.

Q. What, in your opinion, was the fair market value of that grazing right, in April of 1950?

A. Sir, I have never tried to purchase any oth-

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

ers, and I couldn't—I just figured that the whole deal was worth that much to me in my operations.

Q. Did you discuss the grazing rights with Mr. Rubelt when you were negotiating this deal?

A. Yes, sir, he told me that those were good rights out there, and we had a long right, about as old as anyone's out there.

Q. Would you state whether you had an agreement with Mr. Rubelt that he was to remain on the place?

A. Well, that first trip we were out there he said that he would like to stay on the place, and I told him that that would probably be all right with me.

Q. Was there anything said about the taxes and state land lease rentals, in connection with his staying on the place?      A. No, sir.

Q. There was no relationship in your mind——?

A. (Interposing) No, sir.

Q. (Continuing) ——between his paying the taxes and the state land lease rentals, in connection with being permitted to stay on the place?

A. No, sir.

Q. So that the property that you leased was rented for \$3,000.00, less whatever the taxes and state land lease rentals might be?

A. Yes, sir.

Q. (By Mr. Greenfield): And that was the price that you intended to rent it for?

A. All I considered was that \$3,000.00 I had to

Plaintiff's Exhibit No. 3—(Continued)

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pay each year, sir, and I wasn't going to think about those other things until I had to pay them.

Q. Did you discuss this deal with your tax accountant, before you entered into it?

A. No, sir.

Q. Had you considered the tax liability that you might incur or not incur on a lease-option basis, when you decided that that's the way you wanted it?

A. I didn't consult anyone on it.

Q. Did you consider it in your own mind?

A. I don't understand taxes very well, sir.

Q. Was there any discussion ever had between Mr. Rubelt and you and your brother, or you and Mr. Hall, or any of you, regarding interest?

A. He was to charge me interest on the remaining \$7,000.00, I think.

Q. But the \$33,000 was interest-free?

A. Yes, sir.

Q. You think he understood it that way?

A. Yes, sir.

Q. In December of 1950, you and Mr. Rubelt amended the lease, do I understand?

A. Whatever that date is on there.

Q. I think that's the correct date. That was at your request?

A. Yes, sir.

Q. (By Mr. Greenfield): What was your object in doing that?

A. Well, drawing that lease up, I thought Mr. Hall favored Mr. Rubelt a little bit there, inasmuch as it only gave me thirty days to take that option

## Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

up in, and I thought that, forgetful as I am, I might forget to take up that option; or, in case I died, some of my family might forget to take that option up; and after paying that much money in on it, I certainly wanted to have the ranch there.

Q. Since taking over the ranch in April of 1950, what if anything have you done toward improving the place?

A. I improved the road quite a good deal. That road was almost impassable when I took it over. And I put in a culvert where it went over an old creek, where you might get stuck or might break it to pieces fording the creek. I throwed lots of rocks out of the road, and made it fairly passable. And I have put in a corral and a loading chute and branding chute, that cost me approximately a thousand dollars. I have done the house over a little bit, to make it a little more livable. I put a lining in the porch, and I put a sink in the house, so it would be a little bit more convenient for the people living there. And during the high water of the spring—1951?—the fellow that was staying out there called me up and said the water was going to wash the dam out, and I hurried out there with some dynamite, and borrowed a horse from the Flying H ranch and rode over there. Just before I got over there, however, the foreman from the Flying H ranch and my man had blown the spillway out. It was a rock spillway, with some boards in it; and Mr. Rubelt in his conversation before then told

## Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

me he had had to blast that out before, in case of high water, to keep the dam from going over. And they had blasted that out, and it took some of the cement out there. And just as soon as I could I took a lot of gravel out from here and repaired that; just as early as I could in the spring, I took a lot of gravel out from here and repaired it much better than it was, and fixed it so we could get those boards out in case of high water. He had them standing up like this (indicating), and the water was going over the top; and now I have them laying down like this (indicating), with a chain on every other of those; and now it's possible to pull those boards out without risking your life. And I have repaired that quite a little better than it was. And I have endeavored to keep the fences up as good or better than they was. And minor repairs around the corrals and small pens in around the ranch there.

Q. (By Mr. Greenfield): How much hay did you raise in 1950?

A. I didn't measure it, sir.

Q. How much hay did you raise in 1951?

A. I think I have raised about the same amount of hay every year out there, probably, with the exception of the year I blowed the spillway out and lost some of my hay. I think I didn't raise quite as much that year.

Q. How much hay did you raise in the years other than the one year you mention?

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

A. I think there is approximately two hundred tons of hay in there; I think there is approximately 250 tons, now. The hay can be measured out there now.

Q. Have you engaged in any new planting of hay?

A. Yes, we reseeded the upper meadow with new clover.

Q. (By Mr. Greenfield): How much land is involved in the reseeded?

A. I would have to talk with my men, but it had timothy in there, and I reseeded with clover. There might be thirty acres in there.

Q. Is there any area that has apparently grown hay in the past and is not growing hay now?

A. No, sir.

Q. Do you think it is possible to raise any more hay than you are now growing?

A. I think I have taken good care of that hay, and cut all except if you got down in the ditches and wanted to cut those tules and very rough hay.

Q. Do you think it would be possible to raise 400 tons of hay on the place?

A. Not now, unless you worked some of the old tight sod over and replanted. I have not replanted any down by the house; I think it's the original hay or original grass that grew there. I don't know.

Q. By breaking up some of the sod and reseeding it, it might be possible to raise 400 tons of hay on the place?

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

A. It might be. It's not very level. You have to pond the water on some of the low land, to make it get up on the high.

Q. What, in your opinion, is the value of the place now?

A. Well, sir, I don't want to sell the place. I need it in my operations, and under the present condition I don't know what you could sell it for.

Q. To what extent do you think you have increased the value of it by the improvements you have made on it?

A. Just like I told you.

Q. (By Mr. Greenfield): How much money would that run to?

A. I don't know, sir; that would have to be someone else's job.

Q. Do you think it would run over \$2,000.00?

A. I think I have spent that much in fixing it up.

Q. The improvements you have made have a value——?

A. Maybe more than that. They worked quite extensively every year on the fences. I don't know how much, especially for the other years. I have kept a little better track, this year; since he complained about the way I kept things up, I have kept a little better track of it.

Q. Do you think the expenditures for improvements, as distinguished from ordinary maintenance, would exceed two or three thousand dollars?

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

A. No, sir.

Q. At the time you entered into the agreement, in April of 1950, did you consider it then that you were entering into a contract of sale or a contract of lease?

A. I thought that I could decide that later, sir.  
Mr. Greenfield: I think that's all.

Redirect Examination

Q. (By Mr. Anderson): Mr. Bybee, going back to the matter of your home and residence, as I understand it you maintain a home for your family over at Nyssa? A. Yes, sir.

Q. And there are schools at Nyssa where your children go to school? A. Yes, sir.

Q. (By Mr. Anderson): There is no school out in the vicinity of your ranch? A. No, sir.

Q. That's out near Riddle? A. Yes, sir.

Q. There's no school out there?

A. No, sir. There's a schoolhouse there, but since I have been there it has been closed.

Q. The nearest school is Mountain City, Nevada?

A. I don't know; it might be Owyhee, I don't know.

Q. Owyhee is the Indian Reservation?

A. Yes, sir.

Q. Owyhee is quite some distance from your ranch? A. Yes, sir.

Q. About how far is it?



Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

A. About thirty miles.

Q. How far is it from the Rubelt ranch to Mountain City?

A. I think forty miles, or something like that, to Mountain City, and probably twenty-five or something like that to Owyhee.

Q. In Nevada? A. Yes, sir.

Q. You maintain your home also at Riddle, at the Rubelt ranch? A. Yes, sir.

Q. And is that your official place of residence?

A. It's where I choose to stay as much as I can stay.

Mr. Greenfield: Let me object to that as calling for the conclusion of the witness.

Q. (By Mr. Anderson): Is that your official place of residence? A. Yes, sir.

Mr. Greenfield: Same objection.

Q. (By Mr. Anderson): That is your voting residence, isn't it? A. Yes, sir.

Q. You registered at Riddle to vote, in 1952?

A. Yes, sir.

Q. And you voted at Riddle in the general election in 1952? A. Yes, sir.

Q. You also have your ranch at Grandview, or near Grandview? A. Yes, sir.

Q. That's known as the Shoofly ranch?

A. Yes, sir.

Q. How large is that ranch?

A. Approximately four hundred acres of farming ground.

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

Q. That's approximately four hundred acres of irrigated crop land?      A. Yes, sir.

Q. Your brother is interested with you in that, too?      A. Yes, sir.

Q. That's W. A. Bybee?      A. Yes, sir.

Q. Do you also have lands over in Malheur, Oregon?      A. Yes, sir.

Q. Near Nyssa?      A. Yes, sir.

Q. Irrigated lands?      A. Yes, sir.

Q. (By Mr. Anderson): How much land do you have there?

A. I think approximately 350 or -75 acres there.

Q. Irrigated land there?      A. Yes, sir.

Q. Who takes care of the farming operations at Nyssa?

A. That's my brother's responsibility.

Q. W. A. Bybee takes care of the ranch operations over in Malheur County?      A. Yes, sir.

Q. Who takes care of the ranch operations at the Shoofly ranch?

A. That's my responsibility.

Q. That's near Grandview.      A. Yes, sir.

Q. And whose responsibility is it to oversee the operations at the Rubelt ranch at Riddle?

A. That's mine.

Q. And has that been true during the last three years?      A. Yes, sir.

Q. It was true in 1951?      A. Yes, sir.

Q. And in 1952?      A. Yes, sir.

Q. And throughout 1953?      A. Yes, sir.

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

Q. You have taken care of the operations during all that time in Idaho, and your brother the operations in Oregon?      A. Yes, sir.

Q. And when you are at the Riddle ranch, you live in the home there?

A. In one of the rooms, yes, sir.

Q. (By Mr. Anderson): You batch there, or eat there?

A. No, I eat with the family I have out there taking care of the ranch.

Q. And when you are at Grandview, where?

A. Well, I stop at the house there, many times, back and forth. There is an old house there by the river, and I batch some there.

Q. That's the old pump house?

A. Yes, sir.

Q. And you batch some there?

A. Yes, sir.

Q. That's mostly a way-station, going to and from Riddle?      A. Yes, sir.

Q. I think the record isn't quite clear on your hunting and fishing licenses. You say you didn't buy a hunting and fishing license this year, 1953?

A. No, sir.

Q. Do you know whether or not you bought one in 1952—that's last year?

A. Gene, I have bought about two licenses since I came out here, and I don't know.

Q. Thirteen years ago?      A. Yes, sir.

Q. Well, did you hunt in 1952?

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

A. No, sir.

Q. If you bought a license in 1952, you don't recall it, I take it?

A. I don't know which year it was. I might have a record of it somewhere, I don't know. I have bought about two licenses.

Q. (By Mr. Anderson): That's two licenses in thirteen years?      A. I think so.

Q. Now, Mr. Bybee, let's go back to the time when Mr. Rubelt and you first went to Mr. Hall's office, the first day you saw Mr. Rubelt and came in with him to Mountain Home. Had you ever seen Mr. Hall before that?      A. No, sir.

Q. Did you know he existed, before that time?

A. No, sir.

Q. Had you ever heard of him?

A. No, sir.

Q. Did Mr. Rubelt appear to know him?

A. Yes, sir.

Q. Mr. Rubelt told you to go to that office with him, did he?      A. Yes, sir.

Q. And you went there with Mr. Rubelt?

A. Yes, sir.

Q. You said Mr. Rubelt went over to the office. Did he get out of the car first?

A. Yes, sir.

Q. And go to open the door?

A. Yes, sir, and to my surprise he walked in.

Q. And you were in the car?      A. Yes, sir.

Q. And your brother, W. A. Bybee, was in the

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

car with you?           A. Yes, sir.

Q. (By Mr. Anderson): Did Mr. Rubelt appear to know Mr. Hall?           A. Yes, sir.

Q. How were you able to tell?

A. Well, Mr. Hall called him by his first name, "Henry," all the time we were in there.

Q. You had never met or talked to Mr. Hall before then?

A. No, sir, I never knew he was alive, sir.

Q. And during all the time you were there that day, was Mr. Hall there with you?

A. Yes, sir.

Q. Let's go to a day or two later, when you and Mr. Rubelt were to meet and go to Mr. Hall's office. As I understand it, you agreed to meet at the Mellen Hotel?           A. Yes, sir.

Q. At about one o'clock?

A. As I remember.

Q. And you testified, I believe, that you went to the Mellen Hotel and waited for Mr. Rubelt?

A. Yes, sir.

Q. And he didn't come?           A. Yes, sir.

Q. And you went to Mr. Hall's office, and Mr. Rubelt was there?           A. Yes, sir.

Mr. Greenfield: Just a minute, I object to a continuing line of leading questions which I don't think are proper on redirect examination.

Q. (By Mr. Anderson): What was Mr. Rubelt doing there?

A. I went into the office, and I asked the girl if

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

Mr. Rubelt had shown up, and she said, "Yes, he is in there," and I opened the door and Mr. Rubelt was there with his back to me, and Mr. Hall with his face to me.

Q. And were they across the desk from each other?      A. Yes, sir.

Q. And were they talking to each other?

A. Yes, sir.

Q. Do you know what they were talking about?

A. I think they were talking about this contract, sir, and this lease and option to purchase.

Q. And was it at that time that Mr. Hall explained the lease and option agreement, and explained it section by section?

A. Yes, sir, before we got out of there. I don't know as he started right in, but he had the instrument prepared, and he set on this side and Mr. Rubelt and I sat on that side, and he read it very slowly and very cautiously, and explained all of it.

Q. And do you know whether Mr. Rubelt listened very intently?      A. Yes, he did.

Q. And did he ask questions?

A. Yes, I think there was some questions brought up.

Q. And was Mr. Rubelt present there that day all of the time you were in Mr. Hall's office?

A. Yes, sir.

Q. That was when the initial lease and option agreement was signed?      A. Yes, sir.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Q. (By Mr. Anderson): By Mr. Rubelt and yourself?

A. Yes, sir. My brother, Mr. W. A., wasn't there.

Q. He signed later, in Nyssa, Oregon?

A. Yes, sir.

Q. Were those contracts distributed, do you remember? That is, among the parties?

A. He gave me one, and he gave Mr. Rubelt one, and he kept one—I don't know whether he had any more copies or not. I know I made a copy of it for the Taylor Grazing, and then I think I took the original down to Owyhee County and had it recorded.

Q. What was your opinion of the value of that Rubelt ranch and spread, at the time you dealt for it?

A. Well, it was quite remote out there——

Q. (Interposing) What was your opinion of the value of it?

A. I thought it was worth twenty-five or thirty thousand dollars.

Mr. Anderson: That's all.

Recross Examination Under the Statute

Q. (By Mr. Greenfield): You thought it was worth twenty-five or thirty thousand dollars, cash?

A. I didn't have twenty-five or thirty thousand dollars, cash, sir. He just asked me what I thought it was worth, and I just answered him like that.

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

Q. But your statement of twenty-five or thirty thousand dollars is your best estimate of what the place would have been worth? A. Yes, sir.

Q. For cash? A. Yes, sir.

Q. (By Mr. Greenfield): To a man that had cash? A. Yes, sir.

Q. And that was your opinion at that time?

A. Yes, sir.

Q. Now, on the first occasion when you were in Mr. Hall's office, were you the one who told Mr. Hall what to put in the agreement, principally?

A. We sat down around the table, just like this, and I would tell him my idea, and Mr. Rubelt would tell him his idea of how the instrument should be written.

Q. Who did most of the talking?

A. Sir, I wouldn't know.

Q. See if you can remember. Think.

A. Well, we were both there to draw up an agreement, and Mr. Rubelt did part of the agreement and I did part of the agreement. My brother didn't do so much talking.

Q. Mr. Bybee, in the event you want to buy a duck-hunting license for Oregon this fall, will you feel obliged to pay an out-of-state fee to purchase it?

Mr. Anderson: We object to that on the ground it is argumentative and hypothetical.

A. Sir, I have never hunted ducks in my life, so I am certain I will not apply for one.



Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Mr. Greenfield: That's all.

(Witness excused.)

Reporter's Certificate

I, Frank J. Kester, hereby Certify:

That I attended the hearing in the above entitled matter and correctly reported in shorthand the evidence and proceedings taken and had in said hearing; that the above and foregoing is a full, true, and correct transcript of my shorthand notes taken at said hearing, and is a full, true, and correct record of the evidence given and proceedings had thereat.

/s/ FRANK J. KESTER,

Certified Shorthand Reporter, 1201 N. 6th Street,  
Boise, Idaho.

State of Idaho,

County of Ada—ss.

I, Frank J. Kester, a Notary Public in and for the State of Idaho, do hereby Certify:

That the above named D. O. Bybee, the witness aforesaid, was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth, in the case aforesaid, and that the deposition by him deposed was reduced to writing by myself; that George A. Greenfield and Laurence N. Smith, Attorneys-at-Law, appeared as counsel for the plaintiff, and Eugene H. Anderson and Samuel Kaufman, Jr., Attorneys-at-Law, appeared as coun-

Plaintiff's Exhibit No. 3—(Continued)  
(Deposition of D. O. Bybee.)

sel for the defendants; that said deposition was taken on Monday, 21, September 1953, between the hours of 2:00 p.m. and 3:30 p.m. of said day, pursuant to oral stipulation contained herein, at the law office of George A. Greenfield, Suite 312, Continental Bank Building, Boise, Ada County, State of Idaho; that I am not attorney for any of the parties hereto or otherwise interested in the event of said action; that no exhibits were marked or offered in evidence thereat.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, this 2d day of October, 1953.

[Seal]           /s/ FRANK J. KESTER,  
Notary Public for Idaho, Residing at Boise, Idaho.

[Endorsed]: Filed October 2, 1953.

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[Endorsed]: No. 14777. United States Court of Appeals for the Ninth Circuit. Henry E. Rubelt, by Raymond Edward Ashby, his grandson and next friend, Appellant, vs. D. O. Bybee and W. A. Bybee, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed: May 27, 1955.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14777

HENRY E. RUBELT, by Raymond Edward Ash-  
by, his grandson and next friend,

Appellant,

vs.

D. O. BYBEE and W. A. BYBEE,

Appellees.

STATEMENT OF POINTS

Pursuant to Rule 17(6) of the Rules of the above entitled court, appellant does hereby make the following statement of points upon which he intends to rely on appeal:

1. The Court erred in granting Defendants' Motion to Dismiss the action.
2. The Court erred in making Findings of Fact Nos. I, IV and V, and such Findings of Fact are against the weight of the evidence and are clearly erroneous.
3. The Court erred in making Conclusions of Law Nos. I and II.
4. The Court erred in failing to find, upon all the evidence, that Plaintiff was entitled to cancellation of the lease and option instruments as a matter of law.
5. The Court erred in failing to find, upon all the evidence, that Plaintiff had established the

diversity of citizenship of the parties, requisite to federal jurisdiction.

SMITH & EWING,  
CARVER, McCLENAHAN &  
GREENFIELD,

/s/ By GEORGE A. GREENFIELD,  
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed June 6, 1955. Paul P. O'Brien,  
Clerk.

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[Title of U. S. Court of Appeals and Cause.]

#### DESIGNATION OF RECORD ON APPEAL

Comes Now the appellant in the above entitled cause and pursuant to Rule 17(6) of this Court hereby designates the following as the record to be printed on appeal:

1. The entire Reporter's Transcript of all testimony.
2. The Complaint.
3. The Answer.
4. Deposition of defendant, D. O. Bybee, admitted in evidence.
5. Findings of Fact and Conclusions of Law.
6. Judgment of Dismissal.
7. Notice of Appeal.

8. Statement of Points Upon Which Appellant Intends to Rely on Appeal.

9. Designation of Contents of Record on Appeal.

SMITH & EWING,  
CARVER, McCLENAHAN &  
GREENFIELD,

/s/ By GEORGE A. GREENFIELD,  
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed June 6, 1955. Paul P. O'Brien,  
Clerk.



IN THE  
United States  
Court of Appeals  
For the Ninth Circuit

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HENRY E. RUBELT, by Raymond Edward Ashby,  
his grandson and next friend,

*Appellant.*

VS.

D. O. BYBEE and W. A. BYBEE,

*Appellees.*

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APPELLANT'S BRIEF

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*Appeal from the United States District Court for the  
District of Idaho, Southern Division*

---

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*Attorneys for Appellees.*

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FILED

SEP 20 1955

PAUL P. O'BRIEN, CLERK





IN THE  
United States  
Court of Appeals  
For the Ninth Circuit

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HENRY E. RUBELT, by Raymond Edward Ashby,  
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vs.

D. O. BYBEE and W. A. BYBEE,

*Appellees.*

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APPELLANT'S BRIEF

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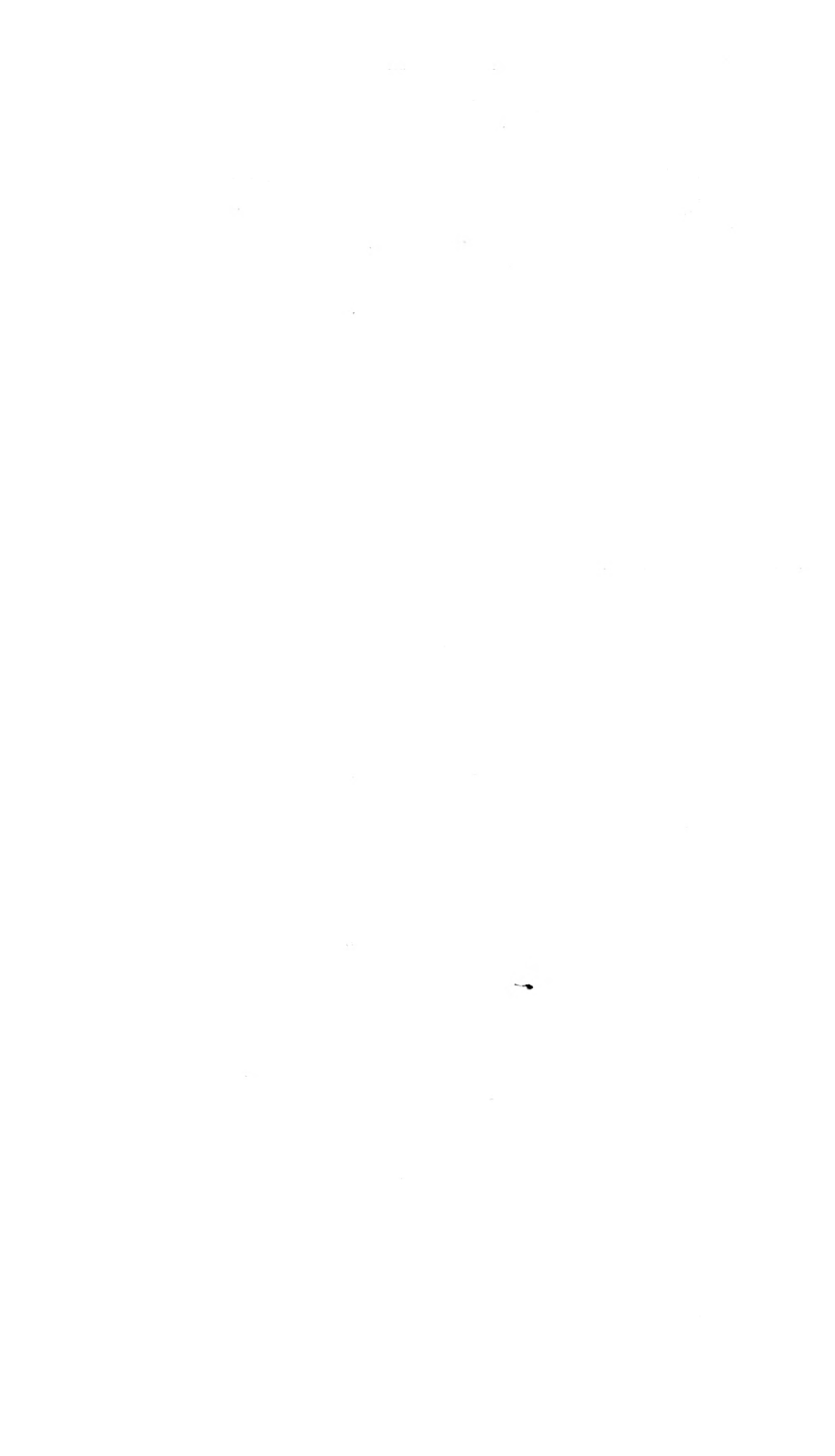
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IN THE  
United States  
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HENRY E. RUBELT, by Raymond Edward Ashby,  
his grandson and next friend,

*Appellant.*

vs.

D. O. BYBEE and W. A. BYBEE,

*Appellees.*

---

APPELLANT'S BRIEF

---

*Appeal from the United States District Court for the  
District of Idaho, Southern Division*

---

I

STATEMENT OF JURISDICTION

Appellant, Henry E. Rubelt, by Raymond Edward Ashby, his grandson and next friend, commenced this action as plaintiff against appellees, then defendants, in the United States District Court for the District of Idaho, Southern Division, on May 15, 1953, asking for the cancellation of certain lease and option agreements relating to real property located

in the State of Idaho, and for money damages. Final judgment in favor of appellees was entered by the Honorable Fred M. Taylor, District Judge, on March 2, 1955 (37)\*. Notice of Appeal to this Court was filed on March 18, 1955 (38)\*\*.

Plaintiff is a citizen of the State of Idaho. Defendants are citizens of the State of Oregon. The amount in controversy, exclusive of interest and costs, exceeds the amount of Three Thousand (\$3,000.00) Dollars. The District Court's jurisdiction in the action was based on Title 28, U.S.C.A. Sections 1332 and 1655. This Court has jurisdiction to determine this appeal under Title 28, U.S.C.A., Section 1291, and Rule 73, Federal Rules of Civil Procedure.

## II

### STATEMENT OF THE CASE

On or about April 12, 1950, the plaintiff, Henry Rubelt, was the owner of approximately 2,500 acres of deeded land in Owyhee County, State of Idaho (12), held as lessee certain State Land Leases for approximately 2,500 acres of grazing land (43), and possessed a Class I grazing right on Federal lands under the jurisdiction of the United States Bureau of Land Management for 450 cattle and 25 horses (72, 73). This cattle ranch contained 300 acres of meadow or hay land from which 350 tons of hay were cut yearly (43). On it stood a large ranch house, outbuildings, corrals and a barn, and two large

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\*Arabic Numerals in parenthesis refer to pages of the Transcript of Record.

\*\*The parties will be referred to as plaintiff and defendants in this Brief.

reservoirs had been constructed which provided the ranch with ample water to irrigate the hay land in the summer months (51), all of which at that time were in good condition (54). At the time of the transaction which is the basis of this action, the plaintiff, Henry Rubelt, was an elderly man 82 years of age (70, 71), childish in his ways (50), living in the past (50, 128), very hard of hearing, of failing eyesight (126), and memory (128, 129, 147, 159), while the defendant, D. O. Bybee, acting as a partner of the defendant, W. A. Bybee (204), was a man with extensive ranch and irrigated land holdings in two states and actively engaged in their management (226).

On April 12, 1950, the defendant, D. O. Bybee, and the plaintiff, Henry Rubelt, entered into a lease and option agreement whereby the defendants acquired a lease of the Rubelt ranch for a period of ten years at a rental of \$3,000.00 per year with an option to purchase the ranch at the end of the ten year period for the sum of \$40,000.00, all rental payments to apply against the purchase price, the plaintiff, Henry Rubelt, to pay all taxes and state land lease rental charges for the term of the lease and the principal sum to bear no interest until the option was exercised (11-24). The taxes and state land lease rentals amounted to approximately \$800.-00 yearly (46). This agreement was drawn by attorney, Perce Hall, who acted for both the parties and assessed his fees against both (214).

In December of 1950 plaintiff and defendants en-

tered into an amended contract whereby the agreement of April 12, 1950 was modified to provide for a five year option period, being the last five years of the term (24-29).

At the time the agreements of lease and option were entered into the Rubelt ranch had a fair market value of several times the price agreed upon. The witness, Albert Harley, a County Commissioner of Owyhee County, Idaho and a resident of the county for over seventy years, stated the value to be \$95,000.00, and testified that in his opinion the fair rental value of the property was \$6,000.00 to \$7,000.00 per year (144). Appraiser Herschel Davidson estimated the value to be between \$60,000.00 and \$70,000.00, based upon his valuation of the 475 head grazing right at \$125.00 to \$150.00 per head (168). Appraiser Edwin Newell valued the ranch at \$150.00 per cow unit, or approximately \$70,000.00 (180).

Concerning the jurisdictional question, it was urged by defendants and found by the District Court that the defendant, D. O. Bybee, at the time of the filing of this action, was a citizen of the State of Idaho (34). However, Mr. Bybee's own testimony showed that he was in fact domiciled in the State of Oregon, as will more fully appear in Argument.

This action was commenced to procure cancellation of these agreements on the ground that they are grossly inequitable, and taking into account the infirmities of plaintiff at the time of their execution, amount to constructive fraud.



## III

## SPECIFICATION OF ERRORS

1. The lower court erred in making Finding of Fact I, in that the testimony of the defendant, D. O. Bybee, clearly showed that at the time of the filing of this action, he was a resident and citizen of the State of Oregon.

2. The lower court erred in making Finding of Fact IV, in that the undisputed evidence was that the plaintiff, Henry Rubelt, during the period when these transactions took place, was infirm in mind and body and wholly incompetent to transact and carry on his business.

3. The lower court erred in making Finding of Fact V because the agreements are so patently unfair, deceptive and inequitable that, taken with the infirmities of plaintiff they amount to constructive fraud.

4. The lower court erred in failing to decree cancellation of these agreements on the ground of constructive fraud.

## IV

## ARGUMENT

I. The defendant, D. O. Bybee, at the time of the filing of the complaint herein, was a citizen of the State of Oregon, and hence the District Court had jurisdiction of the action by reason of the diversity of citizenship of the parties.

It is conceded that the plaintiff, Henry E. Rubelt, is now and for over fifty years has been a citizen of the State of Idaho. The defendant, W. A. Bybee, is admitted to be a citizen and resident of the State of Oregon. Thus, if the defendant, D. O. Bybee, at the time of the filing of the complaint was a citizen of the State of Oregon, or at least not a citizen of the State of Idaho, then diversity of citizenship of the parties exists to sustain federal jurisdiction.

The testimony of the defendant, D. O. Bybee, revealed that, at the time of the filing of this action, he was physically residing in the State of Oregon from 65% to 80% of the time (191), that when he was in Idaho it was only in connection with his ranching business and that he lived in a furnished room at the Rubelt ranch. The only personal effects he brought into Idaho with him were the clothes on his back (192). His driver's license was an Oregon permit, on which he gave as his home address, "Route 2, Nyssa, Oregon" (197). He had never applied for nor purchased an Idaho driver's license (200). His income tax returns for the 1952 tax year gave his home address as Nyssa, Oregon (200). His Packard automobile is registered in the State of Oregon (201). Virtually all of his personal effects, household goods, furniture and personal belongings are at his Oregon home. His wife and children live there, and his children attend Oregon schools (202, 203). His status was well summed up by his own testimony in reply to a question about where he spent his week-ends.

Mr. Bybee said, "I generally go home on week-ends, to Nyssa." (193).

Under these circumstances it seems quite obvious that the defendant, D. O. Bybee, at the commencement of this action, was domiciled in the State of Oregon, and requisite diversity of citizenship did exist.

The requirements for citizenship upon which federal jurisdiction rests are stated in 1 *Cyclopedia of Federal Procedure* (2d Ed.) p. 465, Section 191:

"To constitute citizenship of a state in a jurisdictional sense there must be, or have been, residence within the state and an intention that such residence shall be permanent, in which sense state citizenship means the same as 'domicile', in its general acceptation. 'Citizenship' and 'residence' are not synonymous, and residence alone does not necessarily determine domicile and may even be temporarily in a different state, notwithstanding the fact that the definition of of 'citizens' in the Fourteenth Amendment to the Constitution refers to the states wherein 'they reside'. Domicile or 'citizenship' is a matter of more or less permanent status and a condition of mental attitude rather than of physical presence."

*Bouviere's Law Dictionary* defines domicile as "that place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning."

Here the most that Mr. Bybee can claim is that he physically resided a small fraction of the year in the State of Idaho where he has business interests. The bulk of his physical residence was in Oregon, and it was in Oregon, of course, that all or nearly all of the incidents of domicile and citizenship are found.

A case squarely in point is *Harton v. Howley*, 155 F. 491, 493 (C.C.W.D. Pa. 1907). In that case for many years the plaintiff had been a citizen of the State of Pennsylvania. Two years before commencement of the suit he became superintendent of a company engaged in drilling oil wells. A year later the company's operations centered in Ohio and plaintiff, to be near the work, established a residence in Ohio leaving his wife and son in Pennsylvania. In Ohio he lived in a furnished room, and he returned to the Pennsylvania home of his wife and son on Sundays. He claimed that he desired to move his wife and son to Ohio and had been endeavoring to sell the Pennsylvania property so this could be accomplished. In finding that he was in fact a citizen of and domiciled in the State of Pennsylvania the court said:

“The question for determination, then, is whether the plaintiff is a resident of Ohio or Pennsylvania, and under the pleadings in the case the burden of showing he is not a resident of the former state rests upon the defendant. ‘To effect a change of citizenship from one state to another there must be an actual removal, an actual change of domicile, with a bonafide intention of abandoning the former place of resi-

dence and establishing a new one, and the acts of the party must correspond with such purpose.' *Kemna v. Brockhaus, et al.* (C.C.) 5 Fed. 762. 'Domicile of origin must be presumed to continue until another sole domicile has been acquired by actual residence, coupled with the intention of abandoning the domicile of origin.' *Prue v. Prue*, 156 Pa. 617, 27 Atl. 291. Applying these principles to the case in hand, and having regard to the employment of the plaintiff, the situation of his family, and all the facts and circumstances surrounding his and their acts during the past two years, I am impressed with the conviction that his real residence and citizenship are in Pennsylvania and that his situation is rather that of one who proposes eventually if family circumstances will permit and his employment so dictates, to change his place of residence permanently, rather than that of one who has already done so."

*Arcadian Knitting Mills, Inc. v. Minowitz*, 51 F. Supp. 601, (D.C. E.D. Pa. 1943) was a case where the defendant moved to dismiss the complaint on the ground that he was a citizen of New York, not of Pennsylvania, and hence no diversity of citizenship was present. The facts showed that defendant physically resided in Pennsylvania where he was employed, while his family lived in Brooklyn, New York. The defendant had stated New York to be his home when he registered for the Selective Service, he filed his income tax returns in New York, the greater part of his

clothing, effects and possessions were in the Brooklyn, New York home and he stated that he came back to his Brooklyn home whenever business permitted. The court held that the defendant was a citizen of New York where the incidents of domicile and citizenship had existed.

See also: *Caldwell v. Firth*, 91 F. 177 (C.C.A. 5th, 1898)

Defendant's effort to transpose his state of domicile from Oregon to Idaho rests almost entirely on his statement that he considers Idaho to be his home. All of the facts are to the contrary.

The case of *Stine v. Moore*, 213 F. (2d) 446, 448 (U.S.C.A. 5th, 1954) disposes of the mental approach to domicile in the following language:

"Residence alone is not the equivalent of citizenship, although the place of residence is prima facie the domicile; and citizenship is not necessarily lost by protracted absence from home, where the intention to return remains. Mere mental taking of citizenship is not sufficient. What is in another man's mind must be determined by what he does as well as what he says."

Applying the facts of this case to the applicable rules of law there seems no doubt but that the defendant, D. O. Bybee, was a citizen of the State of Oregon when this action was commenced and that accordingly jurisdiction of the action was properly in the Federal District Court of Idaho.

II. At the time these transactions were entered into the plaintiff, Henry E. Rubelt, was so infirm in mind and body as to be wholly incompetent to carry on and transact business affairs. The agreements are so patently unfair, deceptive and inequitable that, taken with the infirmities of plaintiff, they amount to constructive fraud and should be cancelled as a matter of law.

In order to fully appreciate the gross unfairness of these contracts, their terms must be carefully analyzed and then related to the undisputed testimony concerning the fair market value of the property at the time of the transactions.

These contracts provide that the plaintiff lease to the defendants his large cattle ranch for the sum of \$3,000.00 per year for a ten year period, plaintiff to pay taxes and state land lease rentals amounting to \$800.00 per year. Even if the agreements stopped there a serious question would arise as to adequacy of consideration, for the uncontroverted evidence was that the ranch had a fair rental value at that time of from \$6,000.00 to \$7,000.00 per year (144). Moreover, this testimony was given by the witness Albert Harley, a County Commissioner of Owyhee County, Idaho, whose official duties involve an intimate knowledge of property values, and who had personally resided in the area as a working stockman and rancher for over seventy years (138-142).

But the agreements do not stop there. They go on to provide that the defendants have an option to pur-

chase the property at any time during the last five years of the tenancy for the sum of \$40,000.00, with all rental payments to be credited against the purchase price. Obviously the option would not be exercised until the end of the term, at which time \$10,000.00 would remain to be paid on the purchase price.

The vice of the transaction is this: Defendants have signed plaintiff up to a deal which credits rent against purchase price in a manner which is not uncommon as to depreciating personalty, but which, as to non-depreciating real property, is not only unusual, but highly delusive. Defendants took advantage of plaintiff to put themselves in a position to purchase a \$70,000.00 to \$90,000.00 ranch for \$10,000.00, by agreeing to rent it first for ten years at \$3,000.00 a year.

By this strategem they made it appear as a \$40,000.00 deal. In reality, adjusting for plaintiff's payment of the taxes and lease payments, it is a non-interest bearing \$2,000.00 deal.

The nominal \$40,000.00 price bears no interest; the balance payable at the time of exercise of the option (\$10,000.00 at the end of ten years), bears 3% interest until paid, but the land lease rentals of approximately \$8,000.00 paid by plaintiff over the term amount to additional credit extended defendants without interest, which more than offsets the interest obligation on the remaining balance.

The picture is even darker when we consider the



true rental value of the property. Over the ten year period the ranch should have brought a fair rental price of at least \$6,000.00 yearly (144). The \$3,000.00 difference yearly amounts to \$30,000.00 for the term. Thus, the plaintiff actually receives \$30,000.00 less than its true rental value by virtue of these agreements, and in addition virtually gives his ranch away. A more outrageous business deal would be hard to imagine, and certainly no one of ordinary common sense would have submitted to such a proposal.

But here we are not dealing with a person of ordinary common sense. Mr. Rubelt was an old man. His memory was faulty. He could not even recognize old friends when he met them (128). He could not see (126). His hearing was bad (126). He would fall asleep while eating (128). Counsel for defendants actually asked Mr. Rubelt if he took care of his own business and the plaintiff replied, "No, I can't see no more and I can't hear no more." (110). Under these circumstances we believe the law will relieve this aged and incompetent man of the onerous and unfair agreements he entered into without the ability or capacity to comprehend their meaning or result.

It is well established that gross inadequacy of consideration may by itself constitute conclusive evidence of fraud. This rule is set out in *I Black on Rescission and Cancellation*, 2d Ed., 499, Sec. 175, in the following language:

"Equity may decree the rescission and can-

cellation of a contract of conveyance where such a gross inadequacy of consideration is shown as to shock the conscience because in this case the disparity between the value of the subject and the consideration given for it is regarded as raising an irrefragible presumption of fraud, or (according to most of the authorities) as constituting in itself conclusive evidence of fraud."

Inadequacy of price sufficient to establish fraud is defined by Lord Thurlow in the English decision, *Gwynne v. Heaton*, 1 Brown, Ch. 1, 9:

"An inequality, so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it."

When due consideration is given to the actual fair market value of this property at the time of these transactions and its fair rental value at that time, and when these factors are related to the terms of the lease and option agreements, and to the fact that Mr. Rubelt was required by the agreements to pay the land lease rentals and taxes and received no interest on the principal during the ten-year lease period, it seems impossible to us that the deal could be explained to a man of ordinary common sense without producing, as Lord Thurlow stated, "an exclamation at the inequality of it."

But even if the court should feel that such inade-

quacy of price might not alone constitute conclusive evidence of fraud, it nevertheless requires only slight additional evidence of overreaching on the part of defendants, or incompetence on the part of plaintiff, to warrant rescission and cancellation of these contracts.

55 Am. Jur. 567, Vendor and Purchaser, Section 91, states the general law:

“In connection with other circumstances, however, the inadequacy of the price may stamp the transaction with the element of fraud on the part of the purchaser, and warrant relief in equity by way of rescission upon the ground of fraud \* \* \*. Certainly, gross inadequacy of the price may in connection with other circumstances slight in their nature, amount in itself to conclusive and decisive evidence of fraud for which a court of equity will afford relief by way of rescission. If, in addition to gross inadequacy of price, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner or a party interested in the property has been misled or surprised, the sale will be regarded as fraudulent. *Relief on the ground of fraud has frequently been granted in connection with weakness of mind or impaired mental capacity on the part of the vendor.*” (Emphasis Supplied)

To the same effect is 2 Pomeroy's Equity Jurisprudence, (4th Ed.) 1940-1944, Section 928:

“If there is nothing but mere inadequacy of price, the case must be extreme in order to call for the interposition of equity. Where the inadequacy does not thus stand alone but is accompanied by other inequitable incidents, the relief is much more readily granted . . . When the accompanying incidents are inequitable, and show bad faith, such as concealment, misrepresentation, undue advantage, oppression on the part of the one who obtained the benefits, *or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other, these circumstances combined with inadequacy in price, may easily induce a court to grant relief, defensive or affirmative.*” (Emphasis Supplied)

The decision most similar on its facts to the instant case is *Allore v. Jewell*, 94 U.S. 506, 523, 24 L. Ed. 260, 264. There, a woman, sixty to seventy years old, sick, mentally weak and confused, sold property valued from \$6,000.00 to \$8,000.00 for \$250.00 down, an annuity of \$500.00 for life, the defendant to pay all of her doctor bills during her lifetime, the property taxes for the year of the sale, and the old lady to have free use of the house existing on the property for approximately six months. The evidence also disclosed that the terms of the proposition were devised by the woman herself. Shortly after entering into this transaction the woman died. In setting aside this transaction the Supreme Court of the United States said:

“The same doctrine is announced in adjudged cases, almost without number; and it may be stated as settled law that, whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside. And the present case comes directly within this principle. \* \* \* The principle upon which the court acts in such cases, of protecting the weak and dependent, may always be invoked on behalf of persons in the situation of the deceased spinster in this case, of doubtful sanity, living entirely by herself, without friends to care for her, and confined to her house by sickness. As well on this ground as on the ground of weakness of mind and gross inadequacy of consideration, we think the case a proper one for the interference of equity, and that a cancellation of the deed should be decreed. \* \* \* The decree of the court below is reversed and the cause remanded, with directions to enter a decree as thus stated.”

See also: *Hume v. United States*, 132 U.S. 464, 33 L. Ed. 393; *Adams Exp. Co. v. Scofield*, 64 S.W. 902 (Tenn. 1901); *Swink v. City of Dallas*, 36 S.W. (2d) 222 (Texas 1931); *Sizemore v. Miller*, 247 P. (2d) 224 (Oregon 1952).

Other cases setting aside conveyances where gross inadequacy of consideration existed are: *Robert v. Finberg*, 85 Conn. 557, 84 Atl. 366, where property worth \$25,000.00 had been sold for \$5,000.00, and *Lavette v. Sage*, 29 Conn. 577, where the appellate court set aside a conveyance of land worth \$7,000.00 which had been sold for \$1,000.00.

## V

### CONCLUSION

This is a case without conflicting evidence. All of the independent testimony shows the Rubelt ranch to have had a fair market value at the time of these transactions ranging from \$70,000.00 to \$90,000.00. Its fair rental value was \$6,000.00 to \$7,000.00 per year. In contrast, old Mr. Rubelt was induced to lease it for ten years for less than half of the fair rental price, and bound himself to sell it at the end of the term for a mere fraction of its true value, to pay the taxes and land lease rentals himself, and all of this without interest. Perhaps the plainest proof of the old gentleman's incompetence is the fact that he agreed to such obviously oppressive and unreasonable terms.

The jurisdiction of the District Court is equally apparent. D. O. Bybee maintained his permanent home in Oregon. His periods of residence in Idaho were related solely to his business affairs, and consisted of nothing more than transient episodes of

temporary separation from his Oregon home and family.

The gross inadequacy of consideration inherent in the agreements here in question, and their deceptive and illusory character, taken with the mental and physical infirmities of the plaintiff, warrant the cancellation of the agreements and a restoration of plaintiff to his original position. Accordingly, it is respectfully urged that this Court reverse the judgment of the District Court and decree these lease and option contracts cancelled.

Respectfully submitted,

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IN THE  
United States  
**Court of Appeals**  
**For the Ninth Circuit**

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No. 17777

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HENRY E. RUBELT, by Raymond Edward Ashby,  
his grandson and next friend,

*Appellant.*

VS.

D. O. BYBEE and W. A. BYBEE,

*Appellees.*

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*Appeal from the United States District Court for the  
District of Idaho, Southern Division*

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**APPELLEES' BRIEF**

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FILED

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**APPELLEES' BRIEF**

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I

STATEMENT OF JURISDICTION

This action was commenced by appellant, through his grandson and next friend, to set aside a lease and option agreement on grounds of fraud, together with a claim for money damages (pp. 3-11). While a judgment of dismissal was entered on the merits in this case (pp. 36, 37), the district court also con-

cluded (p. 36) that the appellant had failed to sufficiently prove diversity of citizenship (pp. 198-234) requisite to conferring jurisdiction under Title 28, USCA, Section 1332, the question of diversity of citizenship having been put in issue by allegations of the complaint (p. 3) and denials and allegations of the answer (p. 30).

## II

### STATEMENT OF THE CASE

On or about April 12, 1950, appellant was the owner of approximately 2500 acres of land in Owyhee County, Idaho, (pp. 4, 30), held state land leases (pp. 5, 30) and held certain federal grazing rights for 450 head of cattle and 25 horses (pp. 6, 31).

Appellant was about 81 years of age (pp. 46, 71, 74) and had two children, Mrs. Clara Ocamica and Henry Rubelt, Jr. (pp. 62, 63, 92). Mrs. Ocamica lived away from the ranch for the past 21 years (p. 64), visiting her father at the ranch about once a year since her mother's death in 1939 (pp. 64, 65). Henry Rubelt, Jr., while owning another ranch of his own (pp. 66, 82, 83) lived on appellant's ranch with his family (pp. 65-67, 84) until after the 12th of April, 1950.

All cattle on the ranch were owned and operated by Henry Rubelt, Jr. (pp. 80-82) and had been for many years (p. 81). Appellant was to receive one-half of the beef money in return for Henry, Jr. running the cattle operation (p. 85).

There were several outbuildings on the ranch (p. 51) and a stone house, completed in 1919, but with no modern facilities (p. 67). The ranch is in a remote part of Owyhee County, Idaho, (p. 217), in desert, rimrock and very rough country (p. 183), accessible only by a rough, rocky trail (p. 173). It is about one mile high in elevation (p. 172) with an average snow depth of three feet (p. 116) and in a very windy country (p. 116). The feeding season is short (p. 171).

Prior to the date of the transaction in question, appellant's son, Henry, Jr. had been planning to move to his own place (p. 89) and appellant had been trying to sell this ranch (pp. 89-90). Appellant had offered the ranch to one Earl Riddle, who lived nearby, for \$40,000.00 and Riddle didn't want it (pp. 90-91.) Appellant also tried to sell it to a sheep man in Twin Falls, Idaho, for \$50,000.00 (p. 91) but this man declined to purchase also.

Appellee D. O. Bybee was interested in purchasing a ranch in the spring of 1950 and while driving around in Owyhee County, Idaho, just looking, was referred to the Rubelt property by some people in that area (pp. 204-205) who knew the place was for sale (p. 205). Appellee had never heard of Rubelt or the Rubelt ranch up to this time (p. 204).

Appellee was referred to Mr. Ocamica, appellant's son-in-law (p. 205) and he made inquiry of Mr. Ocamica as to the nature of the ranch and the price (p. 205). Mr. Ocamica advised that appellant wanted about \$40,000.00 for the ranch (p. 206). Appel-

lee D. O. Bybee then went to the ranch and conversed with appellant and went over the ranch with him (pp. 206-207). While appellee did not know the appellant until this meeting, appellant gave evidence of excellent physical health and was mentally alert, though it appeared there was some impairment of his eyesight (pp. 207-208). He was considered to be quite a remarkable man for his age, from both a physical as well as a mental standpoint (pp. 163-165). Subsequent to this time and as late as November 5, 1953, (pp. 70-71) appellant appeared very mentally alert with an excellent memory (pp. 71, 73-80, 112) and still working in the fields and doing chores (pp. 109-110).

A short time after this first meeting with appellant, both appellees D. O. Bybee and W. A. Bybee went to the ranch and again discussed a possible sale with appellant (p. 212). Appellant, knowing the extent and value of his holdings and having an excellent comprehension of the value of the appurtenant grazing rights (p. 80) offered the place to appellees for \$40,000.00 and when appellees indicated they could not pay that much, appellant offered to lease it to them for \$3,000.00 per year with an option to purchase, applying the rent payments on the purchase price of \$40,000.00, appellant to pay the taxes and state land rentals (pp. 120, 121, 212). Appellees accepted this offer and the three parties went in to Mountain Home, Idaho, to the office of one Perce Hall, an attorney (p. 213). Mrs. Henry Rubelt, Jr., was present during the negotia-

tions at the ranch (p. 211).

Appellees had never seen or heard of Mr. Hall before (pp. 213, 228-229) but he had previously done legal work for appellant (pp. 93-95) and appellant considered Mr. Hall his attorney (pp. 99, 101). The parties discussed the proposed transaction with Mr. Hall and met again at Hall's office several days later to execute the document. (pp. 102, 104, 213-214). Hall read the agreement over (pp. 121, 215, 230) and explained it (pp. 215, 230) and the parties executed the same (pp. 11-23).

Appellees shortly thereafter went into possession and in addition to operating the ranch as an integral part of their cattle operations, made some physical improvements thereon (pp. 220-224) valued in excess of \$2000.00 (p. 223).

In December 1950 the agreement was amended to extend the option period (pp. 24-28, 117). Several years later appellees requested permission to sub-lease the ranch and appellant refused because his son had permitted a sub-lease on the son's ranch and considerable trouble had developed over it and appellant did not want similar trouble (p. 119).

Appellant claims to have learned he was defrauded about a week after execution of the first agreement (pp. 113, 114) however he accepted the rent payments thereafter (pp. 117-118), entered into the amendment in December 1950, and felt friendly to his attorney Mr. Hall (p. 118).

Appellant's complaint, wherein for the first time he claims fraud on the part of appellees, or com-

plaints at all for that matter, was filed May 15, 1953.

Relative to the question of citizenship of appellee D. O. Bybee, the record shows that while he maintained a house in Oregon and his wife and children remained there (p. 202) it was a matter of necessity since there were no schools available near the ranch in Idaho (pp. 224-225) and the ranch was in an extremely remote place out in rough desert country and not conducive to comfortable living for a wife and children. Appellee D. O. Bybee took care of all of the Idaho operations of himself and his brother, involving several ranches (pp. 226-227) and he registered to vote and voted in the 1952 elections at Riddle, Owyhee County, Idaho, (p. 225) and considered Owyhee County, Idaho, his official place of residence (pp. 190, 225).

### III

#### ARGUMENT

Appellant has sought in this action to set aside a lease and option agreement on the grounds of fraud. To support the charge of fraud appellant has made numerous allegations which the facts show to be absolutely false and sham.

Appellant alleged in paragraph VI of the complaint (p. 6) that on April 12, 1950, he was living on the ranch and alone and by himself attempting to operate the same. Appellant's own sworn testimony shows conclusively that he lived on the ranch with his son and daughter-in-law and their children, that the cattle all belong to the son and the son op-

erated the ranch (pp. 66-67, 80-82, 84, 85).

Also in paragraph VI of the complaint, appellant asserts that appellee, D. O. Bybee, fraudulently induced appellant to enter into the agreement in question. This is entirely unsupported by the facts which show conclusively that appellant had been trying to sell the ranch prior to appellees' entrance into the picture (pp. 89-91); that he set the price himself and offered the lease and option provisions (pp. 120, 121, 212) and there is an entire lack of evidence to show that appellees were possessed of any information regarding the ranch which appellant did not have and which appellees should have disclosed or that they dealt other than at arm's length or that they made any false or misleading statements to appellant. A vendor is supposed to know the value and qualities of his own property and there is nothing that requires an arm's length purchaser to disclose other information. Am. Jur. 562, Section 87. While there are exceptions to all rules, there can be no application of any exception to the above rule unless there be some representation by the purchaser upon which an ignorant seller relies to his prejudice. 55 Am. Jur. 563, Section 88. Here we have no evidence of any representations by appellees nor any evidence that they had any superior information which they had a duty to disclose and failed to disclose.

There can be no fraud without misrepresentation. In order that there be an actionable fraud the representation must relate to a matter of fact. 37 CJS

217. One cannot secure redress from fraud where he acted on his own judgment derived from independent knowledge, investigation, reports or advice and not on any representations made to him. Baird vs. Gibbard, 32 Idaho 796, 189 Pac 56; 37 CJS 284, Section 37.

Fraud will not be presumed and the appellant has the burden of establishing all of the elements of fraud by clear and convincing evidence. Nelson vs. Hoff, 70 Idaho 354, 218 Pac 2nd 345; Smith vs. Johnson, 47 Idaho 468, 276 Pac 320.

Appellant uses the term "fraud" or "fraudulently" on numerous occasions throughout the complaint and the above principles as related to the facts apply in each instance.

Appellant also alleges in paragraph VI of the complaint that appellee D. O. Bybee induced appellant to go to the offices of Perce Hall, Bybee's attorney, and there fraudulently induced appellant to execute the agreement. Again the testimony shows clearly that appellant considered Hall to be his attorney (pp. 99, 101); that Hall had previously done legal work for appellant (pp. 93-95) and that appellees had never seen or heard of Hall before (pp. 213, 228, 229) and went to Hall at appellant's suggestion (p. 214). The use of the term "fraudulently" in the several instances above referred to is purely an unfounded conclusion without factual basis or support.

In paragraph VII of the complaint (pp. 6, 7) it is alleged that appellees fraudulently induced appel-



lant to execute the amendment to the agreement in December, 1950. Again this bald conclusion is entirely unsupported in fact.

In paragraph VIII of the complaint (p. 7) it is next alleged that at the time appellant entered into the agreement in April 1950, and the amendment thereto in December, 1950, he did not know the value of his property, the value of the appurtenant grazing rights but in fact believed them worth nothing and because of his age and infirmities of mind and body was unable to obtain these values. Nothing specific was alleged as to the infirmities of mind or body.

There is not one iota of evidence to indicate that appellant was ignorant of the value of his property, in fact, his general sworn testimony indicates quite clearly that he was thoroughly familiar with the nature, extent and value of his holdings and had been trying to dispose of them for comparable prices (and unsuccessfully it might be added) before the appearance of appellees. He advised appellee D. O. Bybee what his grazing rights were (pp. 217, 218) and that they were good rights (p. 218). That he knew the value of these grazing rights was made quite clear even several years later when he testified as follows (p. 80) :

Q. "You had grazing rights with that ranch, didn't you?"

A. "Sure, it wouldn't be no good without."

Q. "No, that kind of ranch is no good without grazing rights, is it?"

## A. "No."

It can hardly be said he believed these grazing rights to be worthless as alleged in the complaint.

In paragraph IX (pp. 7, 8) appellant next alleges that appellees were guilty of fraudulent conduct in several respects. First, that they falsely represented to appellant that the ranch was worth no more than \$30,000.00 when in fact it was worth considerably more. A discussion of value will be set forth hereinafter. For the present let us look only to the question of fraud and misrepresentation. There is no evidence in this record that appellees falsely represented anything to appellant. The general rules of law pertaining to fraud hereinbefore cited are applicable. In addition, the record affirmatively shows that appellee D. O. Bybee did not feel that the ranch was worth \$40,000.00, at least to him (p. 212) and that it was worth actually \$25,000.00 to \$30,000.00 (pp. 231, 232). This was and is appellee's own opinion. An expression of opinion honestly made cannot constitute fraud. 37 CJS 226, Section 10. The record fails to disclose that appellee D. O. Bybee acted in any manner indicating a lack of honesty. He was entirely unacquainted with the ranch (pp. 204, 205) except for several inquiries made after learning it was for sale (pp. 205, 206, 208-211) and the price paid was actually in line with that previously asked by appellant (p. 212) which price was also known to appellant's son-in-law (pp. 205, 206). In addition, having operated the ranch for several years up to the time of

the taking of his deposition, appellee D. O. Bybee still was of the same opinion on value (pp. 216, 217). The allegation of fraud as asserted in this paragraph of the complaint, in light of the evidence, is pure sham.

Secondly, it is alleged in paragraph IX of the complaint that appellee D. O. Bybee knew of the aged and infirm condition of appellant, knew that appellant was ignorant of the value of his property and that said Bybee concealed the true values from appellant. It was quite obvious, of course, that appellant was an elderly man. The record fails to show, however, that he was physically infirm or that said D. O. Bybee knew of any infirmities. The evidence discloses that appellant took said D. O. Bybee on a walking tour of the ranch and certainly outdid the younger man physically (p. 207). In addition, several years later appellant was still working in the field to some extent and doing chores (pp. 109-110). He was a remarkable man both physically and mentally (pp. 150, 151, 163). Age in itself indicates nothing. The wisdom of most people increase proportionately with age up to the point that they become senile and this record discloses no such condition in the appellant. Physical or mental infirmities or knowledge of them in appellee D. O. Bybee was certainly not proven, in fact the opposite appears to be the case.

The question of appellant's knowledge of the value of his property and grazing rights has heretofore been discussed. In addition, his son, daugh-

ter-in-law, daughter and son-in-law all knew he was trying to sell the ranch, knew of his proposed price and his daughter-in-law was present during the discussions with appellees. If he was literally giving the ranch away why was there no opposition or protest from the family?

Nor is there any evidence whatsoever to indicate that appellee D. O. Bybee knew the ranch was of a vastly greater value than appellant was trying to sell it for. In fact, the evidence in that regard shows that the said D. O. Bybee at that time thought it to be of less value, at least on a cash sale basis (p. 232) and he paid the price of \$40,000.00 only because of the lease and option provisions (p. 216).

Thirdly, appellant alleges in paragraph IX of the complaint that at the time of the execution of the agreement and the amendment thereto, appellant was alone and without the advice of counsel and was in effect fraudulently induced to execute the agreements. This has been discussed hereinabove and will not be repeated except to add that such an allegation in light of the evidence is patently false.

Paragraph X of the complaint (p. 8, 9) contains allegations similar in import to those contained in paragraphs VI, VII, VIII and IX with additional allegations that the yearly rentals should have been \$10,000.00 per year and the purchase price of the property for cash \$75,000.00 or on a lease and option basis, \$175,000.00. All other allegations contained therein are merely simple arithmetic and mean nothing.

Appellant called several witnesses to testify to value. Albert Harley, a county commissioner was permitted to testify because of his technical status as a commissioner, however, the court recognized the weakness of his testimony and permitted it only because the case was being tried to the court and not before a jury (pp. 142, 143). Another witness, Davidson, testified that cow unit values were selling for from \$80.00 to \$175.00 (p. 168) but that he had never been on the Rubelt ranch (p. 168). Another witness, Newell, testified to a unit value of \$150.00 (p. 180) but admitted he did not even know where the Rubelt ranch was except by hearsay (p. 180) and had not been on the place (p. 180) nor did he know where the range for the ranch was (p. 181). He did not know the length of the feeding season, the elevation, snow depth, the distance of the Rubelt ranch to Mountain Home, Idaho, the nearest railroad, or the distance to Riddle, Idaho, the nearest settlement of any kind. (pp. 182, 183)

Appellant's testimony on values was very weak and hardly sufficient to overcome the testimony of appellee D. O. Bybee as to his opinion, the testimony of Bybee and appellant himself as to appellant's apparent opinion based upon his sales price, or the fact that none of the members of appellant's family made any protest or objection to either this sale or prior attempted sales for comparable prices. In addition, if the property was worth anywhere near what appellant alleges it to be in his complaint, either Earl Riddle or the Twin Falls sheep man to

whom appellant had offered the property previously, or others in the area, would have jumped at the chance to make such a remarkable purchase. The testimony is insufficient to show that the actual purchase price in the instant case, considering application of lease payments to purchase price and payment of taxes and state land rentals by appellant, was so grossly inadequate as to shock the conscious.

Even if it were to be assumed for the sake of pure argument that the price was inadequate, yet nevertheless inadequacy of price agreed to be paid for land is not ordinarily of itself sufficient to prove fraud on the part of the purchaser and entitled the vendor to have the sale set aside for such fraud where there is no confidential relationship between the parties and nothing to indicate mental incapacity or weakness on the part of the vendor. 55 Am. Jur. 566, Section 91.

Gross inadequacy of price, in order to constitute fraud, must generally be connected with other circumstances, though slight in their nature, to afford relief by way of rescision. 55 Am. Jur. 567.

Among the circumstances, which, when combined with gross inadequacy of consideration, form a ground for rescinding a contract are fraud or deceit (not shown in this case) or the violation of a confidential relationship (not shown in this case). In absence of fraud or imbecility, mere old age, consequent loss of memory and feeble health are not sufficient ground for rescision although a sale is made for much less than the value of land. 66 CJ

748, Section 319.

In the instant case as heretofore discussed, there is no proof whatsoever of fraud on the part of appellees or either of them. Appellant's proof shows only that appellant was elderly, somewhat hard of hearing with naturally failing eyesight and occasional memory lapses. The evidence discloses affirmatively that appellant was a remarkable man for his age, both mentally and physically, and fully possessed of all of his mental faculties. Far from being imbecilic, he was mentally alert, and far from being in feeble health was very active physically for a man his age. Again, assuming an inadequacy of price, where are the additional factors which are necessary to permit a rescision? Appellant's own family must have considered him fully capable of handling his affairs for they voiced no protest or objections to either this sale or previous attempts on the part of the appellant to sell his property.

Appellant has not made a case either on inadequacy of price or the necessary accompanying factors.

In paragraph XI of the complaint (p. 10) appellant alleges that the agreements were not read to appellant prior to execution. Again this is patently false (pp. 121, 215, 230). In addition it is alleged that appellant did not discover the unfairness of the transaction until he consulted his attorneys in 1953. This again is not in conformance with the facts. Appellant himself stated that he discovered the fraud about a week after the execution of the agree-

ment (pp. 113, 114). Yet thereafter, he accepted rental payments (pp. 117, 118), entered into the amendment in December 1950 and did not voice any protest until the complaint was filed herein on May 15, 1953, more than three years after appellant claims to have discovered the alleged fraud and deception.

The applicable statutory provisions of the State of Idaho relative to limitation of actions are as follows: (Idaho Code, 5-218)

“Statutory liabilities, trespass, trover, replevin, and fraud.--

Within three years:

1. \* \* \*

2. \* \* \*

3. \* \* \*

4. An action for relief on ground of fraud or mistake. The cause of action in such cases is not to be deemed to have accrued until discovery, by the aggrieved party, of the facts constituting the fraud or mistake.”

Relative to the discovery of the fraud, the Idaho courts have held that knowledge of such facts as would put a reasonably prudent person upon inquiry is equivalent to knowledge of fraud and will start commencement of the statute. *Parish vs. Page*, 50 Idaho 87, 293 Pac 979; *Williams vs. Shrope*, 30 Idaho 746, 168 Pac 162.

In addition to his cause of action, if any really exists, being barred by the Idaho statute of limitations, appellant is estopped by laches from now as-



serting such claim. Where a vendor has knowledge of facts entitling him to rescind for fraud, he must act within a reasonable time. *Tidgwell vs. Bouma*, 157 NW 200; *Schenck vs. State Line Tel. Co.*, 144 NE 592. Rescission of a contract cannot be ordered unless plaintiff has been diligent. *Leppert vs Ratterree*, 276 Pac 1037. A vendor must act promptly after discovery of a fraud in order to rescind a contract for the sale of real property, and if after discovery of the fraud, he accepts any benefits from the contract, as by accepting payments, or does any other act which implies his intention to abide by the contract, he loses his right to rescind. 55 Am. Jur. 1016, Section 624.

In the instant case, appellant accepted rental payments for several years following execution of the agreement in question and entered into an amendment thereof in December, 1950, some eight months following the execution of the agreement and discovery of the purported fraud and deception. In addition, appellees have changed their position in that their cattle operations have been adjusted to make this ranch an integral part of their operations and they have put considerable improvements into the ranch.

Appellant's claim is barred both by the Idaho statute of limitations applicable thereto and by laches.

In his first Specification Error set forth on page 5 of his brief, appellant asserts the lower court erred in making Finding of Fact I (p. 34). The court

found the evidence insufficient to show the residence of D. O. Bybee to be outside of the State of Idaho. Granted that said D. O. Bybee maintained his wife and children in Oregon, nevertheless the testimony shows that the country where he lived in Idaho was hardly a fit place for his wife and children and there were no schools available for the youngest child (pp. 224, 255). The domicile of the wife is not necessarily that of the husband. *Taylor vs Milam*, D. C. Ark., 1950, 89 Fed. Sup. 880. D. O. Bybee considered Idaho his domicile after purchase of the properties here (pp. 190, 255) and was charged with the Idaho operations of he and his brothers (pp. 226, 227). He registered to vote and voted in the 1952 elections in Owyhee County, Idaho (p. 225). The fact that he registered his car in Oregon or had an Oregon drivers license or kept most of his clothes at the home of his wife and children or referred to that place as home is not of sufficient basis, in view of the contrary evidence, to state that the court erred in its finding on this point. The court's finding is not clearly erroneous and on review the evidence will be considered most favorably to appellee. *U. S. vs Comstock Ext. Mining Co.*, CCA 9th, 214 Fed. 2nd 400; *Judd vs Wasie*, CCA 8th, 211 Fed. 2nd 826; *Paramount Pest Control Service vs Brewer*, CCA 9th, 177 Fed. 2nd 564.

The second specification of error set forth by appellant on page 5 of his brief is that the lower court erred in making Finding of Fact No. IV (p. 35) in that the evidence showed the appellant to be infirm

in mind and body and wholly incompetent to transact and carry on his business. The lower court's finding fact in this regard is completely and unequivocally supported by the evidence and the assertions of appellant relative to the infirmity of mind and body, and incompetence to transact and carry on business, are completely without factual support or basis.

In the third specification of error set forth by appellant in his brief on page 5 thereof, it is asserted the lower court erred in making Finding of Fact V (p. 35) in that the agreement is so patently unfair, deceptive and inequitable, that taken with the infirmities of the plaintiff, they amount to constructive fraud. The lower court in this finding states that there is no evidence to indicate whatsoever that there was any fraud on the part of the defendants or either of them in the negotiations for or the execution of either the original agreement or the amendment thereto. Appellant does not indicate that the lower court erred in finding no actual fraud but now claims that the error occurred because the agreements are patently unfair, deceptive and inequitable and amount to a constructive fraud. It is submitted that the agreements are not patently unfair, deceptive and inequitable but are subject to examination by the court in light of all of the evidence produced. In equity, rescission of land contracts is not a matter of right but rests in the sound discretion of the courts. *Kavanau vs Fry*, 262 NW 763. Neither inadequacy of price, improvidence, surprise

or mere hardship require judicial rescision of a contract. *Nunge vs Crawford*, 88 Pa. Super. 516. When a motion to dismiss is made for insufficiency of the evidence, in a case tried without a jury, it is the duty of the court to weigh the evidence. Fed. Rules Civ. Proc., Rule 41 (b); *Chicago and NW Ry Co., vs Froehling Supply Co.*, CA 7th, 179 Fed 2nd 133; *Allred vs Sasser*, CA 7th, 170 Fed 2nd 233.

In addition, it is impossible to construe the agreements in the light of the infirmity of the appellant as set forth in the specifications of error because no infirmities of appellant other than defective hearing, failing eyesight and occasional memory lapses have been shown.

The fourth Specification of Error means nothing since the court could not have decreed a cancellation of the agreements on any grounds at that stage of the lawsuit. Defendant is expressly permitted by the rule (Fed. Rules Civ. Proc., Rule 41) to put on his proof in event of an adverse ruling on his motion to dismiss and he is not deemed to waive the right to offer evidence by making the motion.

### CONCLUSION

While the strongest point appellant makes in this appeal is his claim that the court erred in finding appellant had not produced sufficient evidence to prove the residence of appellee D. O. Bybee to be without the State of Idaho, yet nevertheless the court's finding in that respect is supported by evidence and is not clearly erroneous. In addition, the question of jurisdiction in this case is absolutely im-

material to the final determination thereof on the merits and the record completely fails to show in any respect whatsoever that the lower court erred in its Findings of Fact IV and V as set forth in appellant's Specifications of Error, 2 and 3.

The doctrine that a "scintilla" of evidence is sufficient against a motion to dismiss is not followed in the federal courts. The rule is that there must be substantial evidence before the defendant is required to undertake a defense. *Carew vs RKO Radio Pictures*, DC Cal., 43 Fed. Sup. 199. On appeal, the lower court's findings of fact are presumptively correct and will not be set aside unless *clearly* erroneous. *Olson vs Standard Acc. Ins. Co.*, CA 8th, 211 Fed. 2nd 661; *Judd vs Wasie*, CA 8th, 211 Fed. 2nd 826; *Linscomb vs Goodyear Tire and Rubber Co.*, CA 8th, 199 Fed. 2nd 431; *Paramount Pest Control Service vs Brewer*, CA 9th, 177 Fed. 2nd 564; Fed. Rules Civ. Proc., Rule 52.

This court does not retry the case (*Hudspeth vs Esso Standard Oil Co.*, CA 8th, 170 Fed. 2nd 418) or substitute with respect to issues of fact, its judgment for that of the trial court; there must be a clear showing that the findings of the trial court are erroneous. *St. Louis Union Trust Co. vs Finnegan*, CA 8th, 197 Fed. 2nd 565; *The Sirius Star Inc. vs Sturgeon Bay Shipbuilding and Dry Dock Co.*, CA 7th, 196 Fed. 2nd 479; *Noland vs Buffalo Ins. Co.*, CA 8th, 181 Fed. 2nd 735. In light of the evidence shown by the record in this case it cannot be said that the findings of the lower court are

clearly erroneous and not supported by evidence. In fact, the evidence supporting the findings of the lower court is overwhelming as compared to any evidence supporting the contentions of the appellant, at least so far as Findings of Fact IV and V are concerned.

In addition, the reviewing court should take that view of the evidence which is most favorable to the appellee. U. S. vs Comstock Ext. Mining Co., CA 9th, 214 Fed. 2nd 400; Judd vs Wasie, supra; Linscomb vs Goodyear Tire and Rubber Co., supra; Paramount Pest Control Service vs Brewer, supra.

The record also discloses quite clearly that appellant's action is barred both by the Idaho statute of limitations (Idaho Code, 5-218) and by laches.

Appellees' motion to dismiss was meritorious, the lower court's judgment of dismissal was properly entered and it is respectfully submitted that the same should be sustained.

Respectfully submitted,

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By \_\_\_\_\_  
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Residing at Boise, Idaho.

No. 14,778

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

IDA MAE HERMANN, IRVING E. HERMANN, ROBERT M.  
SMITH, M. B. SCOTT, HAROLD SHEIN, H. C. RICH-  
ARDS, GEORGE PATTERSON, LEONARD ROSEN, ORVILLE  
KELMAN, and CAPTAIN G. D. THOMPSON,

*Appellants,*

*vs.*

CIVIL AERONAUTICS BOARD,

*Appellee.*

---

Appeal From the United States District Court for the  
Southern District of California.

---

## BRIEF FOR APPELLANTS.

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FILED

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IN THE

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SMITH, M. B. SCOTT, HAROLD SHEIN, H. C. RICH-  
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*Appellee.*

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Appeal From the United States District Court for the  
Southern District of California.

---

## BRIEF FOR APPELLANTS.

---

### Jurisdictional Statement.

This is an appeal by appellants, respondents below, from an order of the United States District Court for the Southern District of California, Central Division, enforcing ten administrative *subpoenas duces tecum* served upon appellants in the course of an administrative proceeding pending before a hearing examiner of appellee, the Civil Aeronautics Board, the petitioner below. The order of the District Court required the ten appellants to appear before the hearing examiner and produce all of the documents sought in ten administrative subpoenas.

The jurisdiction of the District Court was based upon Section 644(d) of Title 49 of the United States Code. The petition of appellee to enforce administrative sub-

poenas was filed and an order to show cause directed to appellants was issued on March 29, 1955. [R. 3, 67.] Appellants filed their return to the order to show cause and their answer to the petition of appellee on April 6, 1955. [R. 68.]

The final order of the District Court enforcing subpoenas was entered on May 17, 1955. [R. 144.] Appellants filed their Notice of Appeal on May 19, 1955 [R. 146] and the record was docketed in this court. The jurisdiction of this court is based on Section 1291 of Title 28 of the United States Code and Rule 81(a)(3) of the Federal Rules of Civil Procedure.

### **Statement of the Case.**

This appeal is concerned with the validity of ten administrative subpoenas issued and served by the appellee, the Civil Aeronautics Board, hereinafter called "the Board," in the course of an administrative proceeding pending before a Hearing Examiner of the Board. The administrative proceeding referred to is an enforcement proceeding brought by the Compliance Section of the Board entitled, "In the Matter of Great Lakes Airlines, Inc., *et al.*, Docket No. 6908," hereinafter called "Docket 6908."

The nineteen respondents in Docket 6908 consist of two air carriers, Great Lakes Airlines, Inc., hereinafter called "Great Lakes," and Currey Air Transport Limited, hereinafter called "Currey," licensed by the Board to engage in interstate air transportation as non-scheduled air carriers; twelve ticket agencies hereinafter called "the Ticket Agency Respondents" which engage in the sale of tickets to the public for air transportation to be performed by various non-scheduled airlines, including respondents Great Lakes and Currey; Nevada Aero Trades Company,

a partnership engaged in the leasing of aircraft; Air International, Inc.; and Great Lakes Airlines Agency, Inc.; appellants Ida Mae Hermann and Irving E. Hermann are also individual respondents in Docket 6908. The issues in Docket 6908 relate to alleged violations by the above named respondents of the Civil Aeronautics Act of 1938, as amended (49 U. S. C., Sec. 401, *et seq.*) hereinafter called "the Act," and the Board's regulations promulgated thereunder. These alleged violations relate to (1) frequency and regularity of flight operations; (2) acquisition and maintenance of control by respondents Ida Mae Hermann and Irving E. Hermann over Currey and the Ticket Agency Respondents without prior Board approval; and (3) various ticketing practices engaged in by the Ticket Agency Respondents. There are no issues relating to safety in the administrative proceeding.

The appellants, Ida Mae Hermann, Irving E. Hermann, George Patterson, H. C. Richards, Robert M. Smith, Captain G. D. Thompson and Leonard Rosen, are officers or employees of the respondent companies in Docket 6908. The appellants Harold Shein, Orville Kelman and M. B. Scott, are independent contractors who perform accounting or advertising functions for some of the respondent companies.

The Hearing Examiner ordered appellants to produce all of the documents called for in each of the subpoenas, over the objections of the appellants and the respondents in Docket 6908. The Examiner's action was affirmed by the Board. [R. 61.] The appellants having failed to produce the documents, the Board instituted this proceeding in the District Court by filing its Petition to enforce administrative subpoenas pursuant to the express provisions of Section 644(d) of The Act. [R. 3.] The District Court

issued its Order to Show Cause directed to the appellants. [R. 67.] The appellants replied thereto and a hearing was held before the District Court on April 5 and 6, 1955. The cause was heard entirely on affidavits. The District Court, after limiting counsel for appellants and the Board to statements of their respective positions, issued an Order on April 7, 1955 [R. 115], hereinafter called "The Inspection Order," staying enforcement of the subpoenas and continuing the cause to April 18, 1955, upon condition that appellants permit inspection and copying of the documents sought in the subpoenas served upon appellants Ida Mae Hermann, Irving E. Hermann, Robert M. Smith, H. C. Richards, George Patterson and Captain G. D. Thompson [R. 39-50, 54-56, 60], excepting only the personal income tax returns called for in the subpoenas served upon appellants Ida Mae Hermann, Irving E. Hermann and Robert M. Smith. [R. 46, 45, 48.]

Pursuant to the District Court's inspection order, six Board employees and agents inspected and copied the documents called for in the subpoenas, commencing April 7, 1955 through April 15, 1955. The hearing was resumed before the District Court on April 18, 1955, at which time the Board made no further showing of relevancy or materiality of the documents sought in the subpoenas, but instead presented affidavits to the District Court, without notice to appellants, which purported to show that the appellants had not complied with the inspection order of the District Court. [R. 117-125.] Thereupon, and without further notice or argument on the merits, the District Court ordered all of the subpoenas enforced, exactly as written [R. 126] excepting, however, the subpoena served upon appellant Leonard Rosen which was not pressed by the Board. [R. 57.]



The appellants filed a petition for rehearing, which was argued on May 9, 1955. Counsel for appellants and the Board were permitted, for the first time, to present argument on the factual and legal questions involved. Appellants presented the arguments and objections to the subpoenas which had been raised before the Hearing Examiner of the Board. Appellants also argued that substantially all of the documents sought in the subpoenas had been inspected and copied or photographed by representatives of the Board pursuant to the District Court's inspection order and that the Board had many of the documents in its possession. The Board made no showing of relevance or materiality of the documents sought in the administrative subpoenas at this time.

The cause was taken under submission and on May 12, 1955 the District Court issued its Memorandum for Order Enforcing Subpoenas [R. 143], wherein the Court denied the motion for rehearing, vacated the original order for enforcement of the subpoenas and ordered the subpoenas enforced as requested. The final Order Enforcing Subpoenas required appellants to appear before the hearing Examiner and produce the documents sought in the subpoenas commencing May 31, 1955 through June 14, 1955. The order was docketed and entered on May 17, 1955. [R. 144.]

On May 18, 1955, the District Court issued an order Staying Its Order Enforcing Subpoenas pending determination by this Court of a timely motion by appellants for stay pending appeal. [R. 154.] The appellants filed their Notice of Appeal on May 19, 1955 [R. 146], and filed a timely motion before this Court for a stay pending appeal. Appellants' motion for stay was granted by this Court on May 29, 1955. [R. 161.]

## Specification of Errors Relied Upon.

1. The District Court erred in shifting the burden of proving relevance and materiality of the documents sought in the administrative subpoenas from the Board, the proponent of the subpoenas, to appellants.

2. The Court's Order Enforcing Subpoenas was erroneous because the Board failed to demonstrate that the documents sought in the administrative subpoenas, or any of them, were relevant or material to the issues in Docket No. 6908.

3. The Court's Order enforcing the administrative subpoenas was erroneous because the subpoenas contain no subject matter designation or limitation.

4. The Court's Order enforcing the administrative subpoenas was erroneous because the administrative subpoenas were issued in an adversary proceeding with designated issues.

5. The District Court erred by failing to consider the burden imposed upon appellants and the respondents in Docket 6908 in producing the documents called for in the administrative subpoenas.

6. The Court erred by failing to consider the fact that the production of the documents called for in the administrative subpoenas would deprive the respondents in Docket 6908 of the use of business and financial records vitally needed in the day-to-day conduct of their business.

7. The Court's order was erroneous because a substantial number of the documents sought in the subpoenas are within the possession and control of the Board.

8. The Order of the District Court requiring the production of the personal income tax returns and personal bank records of appellants Ida Mae Hermann, Irving E. Hermann and Robert M. Smith was erroneous because the Appellee made no showing of relevance or materiality of the said personal income tax returns or personal bank records and said order constituted an unreasonable invasion of the rights of privacy of these appellants.

### Summary of Argument.

The principal issue raised by this appeal is the validity of the administrative subpoenas issued by the Board. Granting the authority of the Board to issue the subpoenas as well as the amenability of appellants to the subpoenas, nevertheless, application of accepted legal principles and authorities shows that the administrative subpoenas are invalid because:

1. The administrative subpoenas are too sweeping in scope.
2. Compliance with the administrative subpoenas would cast an unreasonable burden upon appellants.
3. The Board, at the time the subpoenas were issued, had, and continues to have, in its possession, many of the documents sought by the subpoenas.

Appellants will also show below that the Board must sustain the burden of proving the relevance and materiality of the documents sought in the subpoenas, and has failed to do so. The District Court erroneously placed the burden of proving irrelevance and immateriality upon the appellants. The District Court also failed to discharge the functions of a trial court in a subpoena enforcement case.

## ARGUMENT.

### I.

#### The Subpoenas Are Invalid and Should Not Be Enforced.

##### A. The Subpoenas and the Effect of Producing the Documents.

This brief cannot be comprehensible to the Court without summarizing the subpoenas themselves, to demonstrate that they are so sweeping in scope and impose such a burden upon appellants as to render the subpoenas invalid and unenforceable. The ten administrative subpoenas served upon the ten appellants in the proceeding, which were ordered enforced by the District Court, are set forth in full in the transcript of record on appeal. [R. 39-60.] For convenience, the subpoenas are summarized in the appendix to this brief. (*Infra*, pp. 2-6.)

It is difficult, indeed, to summarize the sweep of the ten subpoenas at issue in this proceeding. The period covered by most of the subpoenas is 38 months.<sup>1</sup> The comprehensiveness of the individual subpoenas, particularly those directed to Great Lakes, Currey, Air International, Inc., Nevada Aero Trades Company and Great Lakes Airlines Agency, Inc.,<sup>2</sup> demonstrates that these subpoenas represent the culmination of studied efforts on the part of zealous and imaginative administrative agents to require the production of all records, books and documents of or concerning the respondent companies in Docket No.

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<sup>1</sup>The Scott subpoena is unrestricted as to time, while the Richards, Patterson, Kelman and Thompson subpoenas cover a period of 34 months commencing in May, 1952. [R. 51-53, 54-56, 58-60.]

<sup>2</sup>These subpoenas were issued to Appellants Ida Mae Hermann, Irving E. Hermann and Robert M. Smith. [R. 39, 43, 47.]

6908. The physical burden of producing the documents is sufficient ground to deny enforcement of the subpoenas. *Bank of America v. Douglas*, 105 F. 2d 100 (C. A.-D. C. 1939).

It is possible to analyze the effect of producing the documents sought in the subpoenas in several ways. Our analysis is in terms of the number of documents sought, the number of documents which must be examined to locate and segregate the documents sought, as well as the time and personnel required to do the job.

The record brings to light the following undisputed facts which show the effect upon the appellants and the respondents in Docket No. 6908 of producing the documents demanded in the subpoenas:

Great Lakes and Currey are non-scheduled air carriers engaging in the domestic common carriage of passengers pursuant to licenses issued by the Board. Considerable documentation is involved in conducting business as an air carrier. These carriers are required to adhere to the extensive record keeping and reporting requirements of (1) the Civil Aeronautics Administration, with respect to safety and operational matters, and (2) the Board with respect to economic matters. [R. 110-112, 133-134, 139.] Some 50 to 75 documents are required in connection with each flight operated. [R. 110.] Great Lakes, in addition, has an extensive maintenance division which performs overhaul and maintenance services upon the aircraft owned or operated by Great Lakes, Currey and other airline companies. [R. 110.]

Applying the foregoing facts to the operations of Great Lakes, certain facts become apparent. Great Lakes has

approximately 75 employees. [R. 110.] Production of all of the individual personnel and payroll records and vouchers for a period of 38 months, where there are frequent personnel changes, calls for a substantial number of documents, whose relevance is dubious at best.

Great Lakes issued approximately 2500 tickets per month. Since one subpoena calls for the production of three coupons for every ticket sold in the months of June and November for three years, 1952 through 1954, inclusive, it can readily be seen that Great Lakes must produce 45,000 ticket coupons to satisfy the subpoena. [R. 41.]<sup>3</sup> However, the matter is not that simple, as the subpoena calls for all coupon copies of tickets actually sold to the public during the months of June and November in each of these three years. The ticket coupons are not filed by dates sold, but instead are filed by date of flight. Since many passengers purchase tickets in advance of their flight, it would be necessary to search through the ticket coupons for two or three months following the months named in the subpoena. The best estimate of the time involved in producing these tickets in response to the subpoena is ten weeks and then only if a trained person were devoted to this particular job. [R. 111-112.]

The Board has not made any particular showing of any kind whatsoever why this great number and bulk of ticket coupons are required for its evidentiary purposes. It seems anomalous to require Great Lakes to produce all of these ticket coupons in the absence of such a showing.

A comparable problem with respect to the production of ticket coupons exists in the case of Currey, which is

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<sup>3</sup>The subpoena also calls for many specific tickets [R. 42-43] and for the flight, auditor and agent coupon of each ticket requested.

called upon to produce all of the coupons for tickets sold during the same months. [R. 48.] In fact, an analysis of the flights operated by Great Lakes and Currey between Los Angeles and New York<sup>4</sup> during the calendar years 1952, 1953 and 1954 reveals that Currey operated more flights than Great Lakes, with the obvious result that the burden placed upon Currey would be at least equal to that placed upon Great Lakes. [R. 36-38.]

Another item that is susceptible to ready analysis is the request for all cancelled checks and bank statements of five respondent companies for a 38-month period. In the case of Great Lakes, a recent inspection showed that some 300 checks per month were issued. [R. 111.] This would mean that more than 11,000 cancelled checks need be produced by Great Lakes. It was estimated that the number of bank statements and cancelled checks demanded from Great Lakes, Air International, Inc., Nevada Aero Trades and Ida Mae Hermann, is 25,000 items. [R. 111.] Again, the Board has made no particular showing of relevance, materiality or evidentiary need for all of these documents, or any of them.

Each of the respondent companies in Docket 6908 is required to produce all of its general ledgers and all subsidiary books and ledgers, and all supporting documents to the entries in said books and ledgers for a period of 38 months, Great Lakes maintains a fairly elaborate system of books and its files contain supporting information for every ticket sold. Some 200,000 documents would have to be produced in order for Air International, Inc., Nevada Aero Trades Company and Great Lakes to

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<sup>4</sup>The only flight data of record relates to Los Angeles-New York flights.

comply with this phase of the subpoena. A trained person would require approximately two months to produce all of these documents. [R. 111.] The Board again has failed to show any particular reason for the production of any particular set of books or ledgers or supporting documents, or for all of them.

The subpoenas call for the production of all correspondence, contracts, agreements and options between the nineteen respondents in Docket 6908 over a 38-month period, as well as correspondence between any of them and Robert M. Smith, Arthur R. Currey, and M. B. Scott, Inc.<sup>5</sup> No estimate has been made of the number of documents that need be produced in answer to these demands. However, it is clear that all of the facilities of 22 entities and individuals need be searched with great care to locate all of the documents called for. [R. 112-113.] These companies and individuals, who are engaged in various phases of the air transportation business as well as related and unrelated businesses, should not be required to respond to such a shotgun demand. A subpoena of this type is unreasonable and will not be enforced. *Hale v. Henkel*, 201 U. S. 43, 76-77 (1906).

Appellant Ida Mae Hermann has estimated that the appellants in this proceeding would be required to search through 1,000,000 documents to locate and segregate the documents sought in the subpoenas. [R. 109.] While we recognize that the figure of 1,000,000 documents is an estimate, nevertheless it appears to be fully substantiated by a check of the individual requests contained in the subpoenas.

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<sup>5</sup>None of these three individuals and entities are Respondents in Docket 6908.



It is equally clear that businesses of the type described above cannot function properly without the business records called for in the subpoenas. [R. 114-115.] No attempt has been made to estimate the bulk of the documents sought. It must be clear from the foregoing analysis, however, that a vast bulk of documents need be produced and a great physical burden placed upon the appellants in segregating and delivering up the documents.

**B. Availability of the Documents to the Civil Aeronautics Board.**

Section 487(e) of the Act gives the Board sweeping inspection powers. Most, if not all, of the documents sought in the subpoenas served upon the officers, agents and employees of Great Lakes, Currey, Air International, Inc., Great Lakes Airlines Agency, Inc., and Nevada Aero Trades Company, could have been examined by the Board at any time prior to the institution of Docket 6908. This section of the statute provides as follows:

“(e) The Board shall at all times have access to all lands, buildings, and equipment of any carrier and to all accounts, records, and memoranda, including all documents, papers, and correspondence, now or hereafter existing, and kept or required to be kept by air carriers; and it may employ special agents or auditors, who shall have authority under the orders of the Board to inspect and examine any and all such lands, buildings, equipment, accounts, records, and memoranda. The provisions of this section shall apply, to the extent found by the Board to be reasonably necessary for the administration of this chapter, to persons having control over any air carrier, or affiliated with any air carrier within the meaning of section 5(8) of this title.”

The Board has never caused its agents and employees to inspect the documents sought in the subpoenas. There is no allegation that the respondents in Docket No. 6908, or the appellants in this proceeding, have withheld access to these documents from the Board's agents and employees. In fact, it is uncontradicted that routine inspections of the Great Lakes facilities were made by the Board in 1954, and prior thereto, in connection with other matters, without any objection whatsoever on the part of appellants or the respondents in Docket No. 6908. [R. 109.]

The District Court's inspection order of April 7, 1955 required appellants to make all of the documents called for in the subpoenas served upon the officers, agents and employees of Great Lakes, Currey, Great Lakes Airlines Agency, Inc., Air International, Inc., and Nevada Aero Trades Company, available for inspection, copying and photographing by the agents and employees of the Board, with the single exception of personal income tax returns. [R. 116.] Six representatives of the Board has unrestricted access to these documents for a period of eight days. [R. 129-142.] Nevertheless, no specific showing of relevancy or materiality of any specific document or of any group of documents was made by the Board prior or subsequent to this inspection. It would appear eminently reasonable to require the Board to make a showing of relevance and materiality once an actual inspection of the very documents sought in the subpoenas had been made by the Board.

**C. Many of the Documents Are in the Possession of the Board.**

Reference has previously been made to the fact that Great Lakes and Currey are required to file and in fact do file many documents with the Board and the Civil Aeronautics Administration (*supra*, p. 9). The affidavits of Ida Mae Hermann and the affidavit of Robert M. Smith, which are uncontradicted, reveal that all of the balance sheets and profit and loss statements of Great Lakes and Currey, which are called for in the subpoenas, have been filed with the Board. [R. 111, 134, 139.] In fact, Great Lakes and Currey retain only duplicates of the original documents filed with the Board as part and parcel of regular quarterly reports filed pursuant to applicable Board regulations. [R. 134, 139.]

The uncontradicted affidavits of Ida Mae Hermann also demonstrate that all of the Great Lakes advertising materials called for in the subpoena addressed to Mrs. Hermann have been filed with the Board as part and parcel of regular quarterly reports filed with the Board pursuant to applicable Board regulations. [R. 112, 133-134.]<sup>6</sup>

The subpoena issued to Appellant George Patterson calls for the production of the aircraft maintenance logs for aircraft owned or operated by Great Lakes and Currey. [R. 56.] The uncontradicted affidavit of Ida Mae Hermann demonstrates that most of the pertinent data contained in the aircraft maintenance logs of aircraft owned or operated by Great Lakes is reported to the Civil Aeronautics Board in regular quarterly reports, while such data as is contained in the aircraft mainte-

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<sup>6</sup>Other than a minor item in the amount of \$7.00. [R. 133.]

nance logs and not reported to the Civil Aeronautics Board pertains to safety matters which are not at issue in this proceeding. [R. 113-114.]

It is self evident that documents which are in the possession of the Board need not be produced. *Application of Linen Supply Companies*, 15 F. R. D. 115, 119 (D. C.-S. D. N. Y., 1953).

#### D. Relevance and Materiality of the Documents.

The record reveals that the Board has not shown the relevance or materiality of any of the documents sought in the administrative subpoenas. The Board, instead, filed its Complaint in Docket 6908 as Exhibit A to its Petition to Enforce Subpoenas filed in the District Court. The Board chooses to rely entirely on the issues in Docket 6908 as spelled out in its Complaint to establish the relevance and materiality of all of the documents sought in the administrative subpoenas.

The position taken by the Board raises this issue for determination by this Court: Does the Complaint filed by the Board in Docket 6908 sufficiently establish the relevance and materiality of all of the documents sought in the administrative subpoenas, or the relevance and materiality of any particular document or documents sought in the administrative subpoenas? This question must be determined in the light of the fact that (1) the Board has failed to exercise its unquestioned inspection powers pursuant to section 487(e) of the Act; (2) the Board has failed to show the relevance or materiality of any of the documents sought in the administrative subpoenas after examining most of the documents pursuant to the inspection order of the District Court of

April 7, 1955; and (3) the Board has many of the documents sought in the subpoenas in its possession.

It would appear to be a minimal requirement that the Board make a stronger and more precise showing of materiality and relevancy of the documents sought. This is particularly true in view of the tremendous sweep of the subpoenas in terms of the time period covered and the number and variety of documents sought. Notwithstanding these background facts, the Board has failed or neglected to make this basic showing.

A similar issue was faced in *Goodyear Tire & Rubber Co. v. National Labor Relations Board*, 122 F. 2d 450 (C. A. 6, 1941), where the case was remanded and the District Court directed to consider issues relating to relevance and materiality. The demand there was for the cards in an employee card index. The Court held that the fact that some of the cards were relevant to the issues in the administrative proceeding, and some of the other cards might be relevant to the issues in the proceeding, "does not warrant a demand for the whole." While respondent's "conclusion that this index is not relevant is not final, at least some evidence must be offered to show that it is wrong." (122 F. 2d 453.)

The respondents in Docket 6908 and the appellants in this appeal have argued that the documents sought are irrelevant and immaterial to the issues. The Board has failed or refused to show that the documents are relevant. Under the doctrine of the *Goodyear* case, appellants must prevail unless the Board sustains the burden of proving the relevance and materiality of the documents sought.

Nor can the Board properly argue that it seeks so many documents that it is unable to prove the relevance of

any one document or any single group of documents, for the Board prepared and issued the subpoenas, and the Board must justify and support its own actions in preparing and issuing the subpoenas as written. It has been shown heretofore that the Board was at all times entitled to inspect substantially all of the documents sought in the subpoenas and has, in fact, examined many of the documents sought in the administrative subpoenas (*supra* pp. 13-14). It even has been proved that the Board has in its possession many of the documents sought in the administrative subpoenas (*supra*, pp. 15-16). In the face of these showings, surely the Board is in a position to and should be required to prove relevance and materiality of the documents sought in its subpoenas.

The Memorandum for Order of the District Court, which was the basis for the final order appealed from in this proceeding, provides in part as follows:

“In laying the subpoenas alongside the charges in the Complaint, this Court cannot say that any of the documents or things called for in any of the subpoenas are immaterial or irrelevant to the proceedings before the Board, without an examination of all of the documents and things themselves, which this Court is not called upon to do at this stage of the proceedings.”

The District Court found that it could not say that any of the documents called for in the subpoenas are immaterial or irrelevant. The District Court specifically did not find that any of the documents were material or relevant. This is more than a technical difference. Absent a finding that each document or each group of documents sought in the subpoenas are relevant and material, the subpoenas cannot be enforced. *Goodyear Tire & Rub-*

*ber Co. v. National Labor Relations Board, supra; Bowles v. Cherokee Textile Mills*, 61 Fed. Supp. 584 (D. C.-E. D. Tenn., 1945).

Section 644(b) of the Act outlines the subpoena power of the Board:

“ . . . the Board shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, and documents *relating to any matter under investigation.*” (Emphasis supplied.)

As was stated in the *Goodyear* case, where a similar statute was construed, it is “not difficult here to decide what the ‘matter [under investigation]’ is with relation to which these subpoenas are asked. It is neither the structure nor the commercial history of the company, . . .” 122 F. 2d 453. The issues in the administrative proceeding do not relate to the structure or the commercial history of the respondents in Docket 6908. The issues instead are limited to the charges raised in the Board’s complaint in Docket 6908.

#### **E. The Subpoenas Constitute a General Fishing Expedition.**

An examination of the subpoenas themselves reveals that there has been no attempt to limit the demand for documents to those relating to the issues in Docket 6908. Instead, demand has been made for all of the financial, corporate and operating documents used and maintained by the respondents in Docket 6908. The Board’s obvious purpose in drawing up and issuing these subpoenas was to require the appellants to produce all of the documents of the respondents in the foregoing categories in the hope that some evidence will turn up.

The importance of the word “evidence” was stressed by Mr. Justice Holmes in *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298 (1924), where a statutory provision virtually identical to the one contained in the Act empowered the Federal Trade Commission to issue subpoenas and to have them enforced by the courts. Justice Holmes stated, at 264 U. S. 306, as follows:

“The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it.”

The decision in the *American Tobacco* case and the language of Justice Holmes have application to the instant case. Here the Board has issued sweeping subpoenas and upon objection by the appellants, the Board comes forward with its Complaint in the administrative proceeding and say, in effect, “this Complaint shows the relevance of each and every document sought in the subpoenas.” This is not a showing that the documents are evidence; the Board’s demand instead is for all documents not such documents as are evidence. Under the doctrine of the *American Tobacco* case and the *Goodyear* case, the courts will not countenance such actions and will decline to enforce administrative subpoenas possessing these objectionable features.



**F. Subject Matter Has Not Been Specified.**

The subject matter of the documents sought in the administrative subpoenas must be spelled out or the courts will deny enforcement of the administrative subpoenas. *Hale v. Henkel, supra; cf., Brown v. United States*, 276 U. S. 134, 143 (1928). The parts of *subpoenas duces tecum* which state the subject matter of the documents sought, are sometimes enforced, while the parts of the same *subpoenas duces tecum* which do not, are denied enforcement.<sup>7</sup>

**G. Subpoenas Issued in an Adversary Administrative Proceeding Must Be Strictly Limited.**

Administrative agencies have greater latitude where subpoenas are issued during the course of an exploratory investigation than where subpoenas are issued in an adversary administrative proceeding. In the latter case, the subpoenas are limited and restricted by the issues in the administrative proceeding. This Court recognized this distinction in *Hagen v. Porter*, 156 F. 2d 362 (C. A. 9, 1946). There the administrative subpoena was issued in the course of an investigation to determine whether the respondents had complied with the Emergency Price Control Act and the Administrator's regulations. There were no charges pending against the respondents.

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<sup>7</sup>*United States v. Medical Society of District of Columbia*, 26 Fed. Supp. 55 (D.C.-D.C., 1938); *403-411 East 65th Street Corporation v. Ford Motor Company*, 27 Fed. Supp. 37, 38 (D.C.-S.D. N. Y., 1939).

This Court enforced the administrative subpoenas in *Hagen v. Porter*, and stated, at 156 F. 2d 365, as follows:

“ . . . the standards of materiality or relevancy are far less rigid in an *ex parte* inquiry to determine the existence of violations of a statute, than those applied in a trial or adversary proceeding.”

This administrative proceeding, where the Board seeks to revoke the licenses of Great Lakes and Currey, is clearly a “trial or adversary proceeding” and the permissible breadth of the administrative subpoenas should be limited accordingly. The respondents in *Hagen v. Porter, supra*, also refused to permit the agency to make investigations and inspections while, on the other hand, these appellants have suffered and permitted unrestricted access to and inspection of the documents sought in the administrative subpoenas by the Board. [R. 129-142.]

## II.

### Personal Income Tax Returns Need Not Be Produced.

Appellants Ida Mae Hermann, Irving E. Hermann and Robert M. Smith<sup>8</sup> are required to produce copies of all personal income tax returns for the calendar or fiscal years 1951 through 1954. [R. 40, 45, 48.] The appellants strongly object to furnishing their personal income tax returns. [R. 114.] While the District Court did not include personal income tax returns in its Inspection Order of April 7, 1955, nevertheless these personal income tax returns were included in the final Order of the District Court Enforcing Subpoenas. The Board made no showing whatsoever of any particular evidentiary need for these personal income tax returns and made no showing

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<sup>8</sup>Robert M. Smith is not a Respondent in Docket 6908.

of their relevance and materiality or the relevance and materiality of any income tax return of any of these three individuals for any particular year. The Board relied, instead, upon the issues in the administrative proceeding presented in the pleadings.

We do not claim that personal income tax returns are privileged and cannot be the subject of an administrative subpoena. However, the courts have generally refused to require the production of copies of personal income tax returns under the broad discovery provisions of Rule 34 of the Rules of Civil Procedure, although the courts have otherwise shown great liberality in requiring the production of documents pursuant to this Rule.<sup>9</sup>

The language of the Court in *Garrett v. Faust*, appearing at 8 F. R. D. 557, has particular application to the instant case:

“ . . . I feel that *with all the information that plaintiffs have at their command, and the opportunities they have had to obtain it*, I cannot in good conscience require defendants to submit their income tax returns for copying. I realize that income tax returns may not be privileged within the meaning of Rule 26 . . . but I am not too disposed to require a person to display their contents to the party suing him.” (Emphasis supplied.)

Here the Board has had ample opportunity to obtain the information sought through its inspection powers and its actual inspection of the documents pursuant to the

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<sup>9</sup>*Jacobs v. Kennedy Van Saun*, 12 F. R. D. 523 (D. C.-M. D., Pa., 1952); *United Motion Theatre Co. v. Eland*, 199 F. 2d 371 (C. A. 6, 1952); *Garrett v. Faust*, 8 F. R. D. 556 (D. C.-E. D., Pa., 1949); *Isrel v. Shapiro*, 3 F. R. D. 175 (D. C.-S. D., N. Y., 1942); *Welty v. Clute*, 2 F. R. D. 429 (D. C.-W. D., N. Y., 1939).

District Court's Inspection Order of April 7, 1955. The fact that the information may become available to the Board through the other subpoenas at issue in this proceeding, or through other sections of the subpoenas served upon Appellants Ida Mae Hermann, Irving E. Hermann and Robert M. Smith, also strongly militates against enforcement of provisions of the subpoenas calling for the personal income tax returns of these three individuals.<sup>10</sup>

The Supreme Court has refused to require the production of documents in a closely analogous situation where the documents sought were the "work product" of counsel. The court held that the documents sought were neither privileged nor irrelevant. However, in refusing to order production of the documents, the Supreme Court laid down the principle that there must be a showing that the same information cannot be made available by the production of other documents or ". . . direct from the witnesses for the asking." *Hickman v. Taylor*, 329 U. S. 495, 508 (1947).

The Board, as has previously been noted, made no particular showing of its evidentiary need for or the materiality or relevance of any personal income tax returns. The Board also has failed to show that the same information cannot be made available by the production of other documents or "direct from the witnesses for the asking" and should be required to do so since it appears that the same information is readily available from these sources.

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<sup>10</sup>*Garrett v. Faust, supra*; *O'Connell v. Olsen & Ugelstadt*, 10 F. R. D. 142, 143 (D. C.-N. D., Ohio, 1949); *Maddox v. Wright*, 103 Fed. Supp. 400 (D. C.-D. C., 1952).

III.

**The District Court Has Misconceived Its Function and Has Failed to Discharge the Duties and Responsibilities of a Trial Court in an Administrative Subpoena Enforcement Case.**

It is well settled that the courts in subpoena enforcement cases do not act as mere *automata* or serve as administrative adjuncts. Although Congress has granted administrative agencies the power to issue subpoenas, it has withheld from them the power to enforce their subpoenas. This power was delegated to the federal courts. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 485 (1894), where it is stated:

“The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment.”

In a subpoena enforcement case, “courts act as courts and not as administrative adjuncts,” and they discharge “judicial power with all the implications of the judicial function in our constitutional scheme,” Justice Frankfurter dissenting in *Penfield Co. of California v. Securities and Exchange Commission*, 330 U. S. 585, 604 (1947).

The trial court in a subpoena enforcement case cannot throw up its hands and say that it is unable to determine whether the documents sought in the administrative subpoenas are relevant and material to the issues in the administrative proceeding. *Goodyear Tire and Rubber*

*Co. v. National Labor Relations Board, supra; Bowles v. Cherokee Textile Mills, supra.* This is precisely the action taken by the District Court as shown in its Memorandum for Order Enforcing Subpoenas (*supra*, p. 18). The issue of relevance and materiality of the documents sought must be decided by the court, and the burden of proving relevance and materiality rests upon the Board, the proponent of the subpoenas (*supra*, pp. 16-19). The District Court should have required the Board to come forward with proof of relevance and materiality, or, in the absence of such proof from the Board, dismissed this action upon the merits.

The decisions relied upon by the Board in support of its position are concerned with disputes over "coverage" of the regulatory statute.<sup>11</sup> The distinction between "coverage" cases and cases concerned with the validity of administrative subpoenas is readily apparent. The former is properly committed to the expertise of administrative agencies, while the latter is peculiarly a judicial question. The Civil Aeronautics Board is not expert on the allowable breadth of *subpoenas duces tecum*. Nevertheless, the District Court "rubber stamped" the Board's predetermination of relevance and materiality since the District Court apparently was unable or unwilling to decide these basic issues itself.

The District Court failed or refused to consider the possibility of enforcing the subpoenas, or some of them, in part, or, conversely of denying enforcement of some of the subpoenas in whole or in part. There are a number of cases where the subpoenas were considered to be too broad in scope and the court either quashed the sub-

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<sup>11</sup>See *Endicott-Johnson Corp. v. Perkins*, 317 U. S. 501 (1943); *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186 (1946).

poenas in part or refused enforcement in part.<sup>12</sup> Administrative subpoenas will not be enforced precisely according to their terms and without modification if it appears that they are too broadly or oppressively drawn.<sup>13</sup> The court stated in *National Labor Relations Board v. Pesante, supra*, at 119 Fed. Supp. 458:

“The Anchor Rome Mills case, *supra*, and the Jackson, case, *supra*, so heavily relied upon by the Board in other particulars, are authority for the proposition that if subpoenas are too broadly or oppressively drawn, it would be the duty of the court to prevent abuse of its process by denying enforcement of such subpoenas.”

However, in some situations, the courts have refused to enforce subpoenas even in part.<sup>14</sup>

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<sup>12</sup>*Application of Linen Supply Companies, supra*, holding that the evidence sought bore no relation to the investigation; *In re Eastman Kodak*, 7 F. R. D. 760 (D. C.-W. D., N. Y., 1947), and cases collected at 7 F. R. D. 764; *United States v. Medical Association of the District of Columbia, supra*; *Application of Harry Alexander, Inc.*, 8 F. R. D. 559 (D. C.-S. D., N. Y., 1949). All of the foregoing cases involve grand jury investigations of antitrust violations.

<sup>13</sup>*Jackson Packing Co. v. National Labor Relations Board*, 204 F. 2d 842 (C. A. 5, 1953); *National Labor Relations Board v. Anchor Rome Mills, Inc.*, 197 F. 2d 447 (C. A. 5, 1952); *National Labor Relations Board v. Pesante*, 119 Fed. Supp. 444 (D. C.-S. D. Calif., 1954).

<sup>14</sup>*In re United Shoe Machinery Corporation*, 6 F. R. D. 347, 349 (D. C.-D. Mass., 1947), where the court held that the subpoenas under consideration were “. . . permeated with the invalid, broad and sweeping demand, and no cutting away or pruning of the bad parts is possible,” and the court thereupon quashed the subpoena issued by the Grand Jury in its investigation of antitrust violations; *In re United Last Company*, 7 F. R. D. 759 (D. C.-Mass., 1947), where a subpoena calling for correspondence between two companies for a period of six years was quashed on the ground that it was oppressive and unreasonable in a terse, two-paragraph decision; *National Labor Relations Board v. Pesante, supra*, where 30 administrative subpoenas issued by the National Labor Relations Board were denied enforcement on the ground that each of the subpoenas was oppressive.

The subpoenas in this proceeding exceed the reasonable evidentiary requirements of the Board. Should the subpoenas be enforced at all, they must be limited to those documents required for the reasonable evidentiary needs of the Board.

**Conclusion.**

Upon the basis of the foregoing reasons and authorities, the order of the District Court should be reversed.

Respectfully submitted,

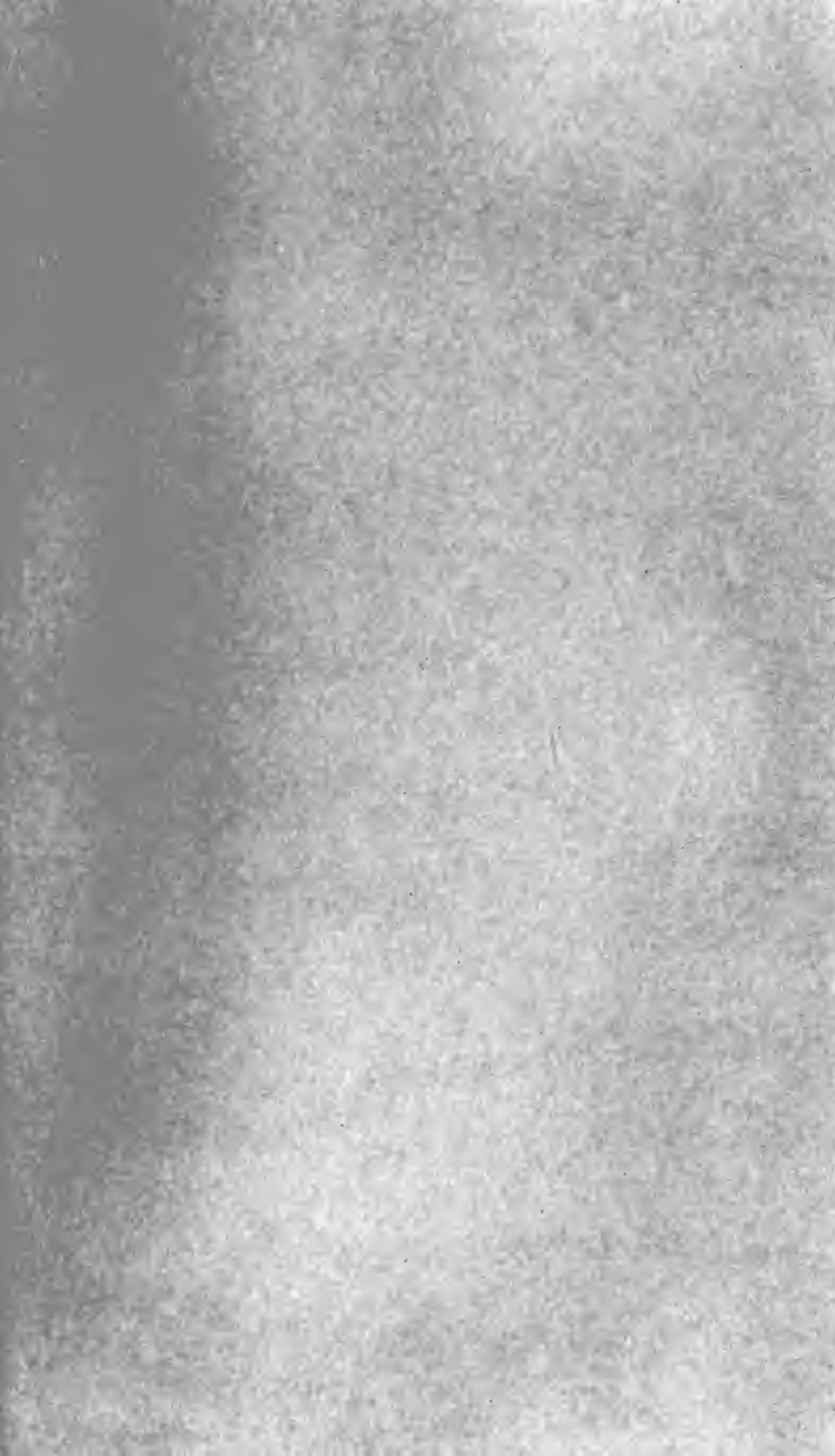
KEATINGE, ARNOLD & OLDER,

By ROLAND E. GINSBURG,

*Attorneys for Appellants.*

October, 1955.







## APPENDIX.

### TITLE 28 UNITED STATES CODE

“Sec. 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.”

### FEDERAL RULES OF CIVIL PROCEDURE

#### “RULE 81.

##### “APPLICABILITY IN GENERAL

“\* \* \*

“(a) To what proceedings applicable.

“(3) In proceedings under Title 9, U. S. C., relating to arbitration, or under the Act of May 20, 1926, c. 347, Sec. 9 (44 Stat. 585), U. S. C., Title 45, Sec. 159, relating to boards of arbitration of railway labor disputes, these rules apply to appeals, but otherwise only to the extent that matters of procedure are not provided for in those statutes. These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of district court or by order of the court in the proceedings, and (2) to appeals in such proceedings.

TITLE 49 UNITED STATES CODE

“Sec. 644. Evidence

“\* \* \*

“(b) For the purposes of this chapter the Board shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, and documents relating to any matter under investigation. Witnesses summoned before the Board shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

“(c) The attendance of witnesses, and the production of books, papers, and documents, may be required from any place in the United States, at any designated place of hearing. In case of disobedience to a subpoena, the Board, or any party to a proceeding before the Board, may invoke the aid of any court of the United States in requiring attendance and testimony of witnesses and the production of such books, papers, and documents under the provisions of this section.

“(d) Any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before the Board (and produce books, papers, or documents if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.”

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Great Lakes, Currey, Air International Inc., Great Lakes Airlines Agency, Inc., and Nevada Aero Trades, Company are called upon to produce the following docu-

ments for a 38-month period, commencing January 1, 1952 through February 25, ~~1952~~<sup>1953</sup>.<sup>a</sup>

1. *All* general ledgers and *all* subsidiary books and ledgers, and *all* vouchers, invoices, journals and other supporting documents to the entries in said books and ledgers.

2. *All* audit report, financial statements (balance sheets, schedules of cash receipts and disbursements, and profit and loss statement).

3. *All* minutes and notes of directors' and stockholders' meetings, stock record books and *all* stock certificates.

4. *All* bank statements and cancelled checks.

5. *All* income tax returns for the years 1951 through 1954, inclusive.

6. *All* correspondence, contracts, agreements and options between any of the nineteen (19) Respondents in Docket No. 6908 and between any of them and Robert M. Smith and Arthur R. Currey.<sup>b</sup>

7. *All* individual, personnel and payroll records and vouchers.

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<sup>a</sup>The Great Lakes documents were called for in the subpoenas served upon Appellants Ida Mae Hermann [R. 39-43], H. C. Richards [R. 54-55], George Patterson [R. 55-56] and Capt. G. D. Thompson. [R. 60.] The Currey documents were called for in the subpoenas served upon Appellants Robert M. Smith [R. 47-50], H. C. Richards, George Patterson and Captain G. D. Thompson. The documents of Air International, Inc. and Nevada Aero Trades Company were also called for in the subpoena served upon Appellant Ida Mae Hermann. [R. 39-43.] The Great Lakes Airlines Agency, Inc. documents were called for in the subpoena served upon Appellant Irving E. Hermann. [R. 43-47.]

<sup>b</sup>All correspondence between Ida Mae Hermann and Irving E. Hermann, husband and wife, is included.

Great Lakes and Currey, the Air Carrier Respondents in Docket No. 6908, are called upon to produce the following additional documents for the same 38-month period, January 1, 1952 through February 25, 1955:<sup>c</sup>

8. Specimens of *all* handcards, brochures, schedules and other advertising material distributed to the public by Great Lakes, Currey and/or their ticket agents.

9. Specimens of each type of ticket and exchange order sold to the public during the years 1952 through 1954, inclusive, by Great Lakes, Currey and/or their ticket agents.

10. *All* flight, auditor and agent coupons taken from documents actually sold to the public by Great Lakes, Currey, and/or their ticket agents during the months of June and November for the years 1952 through 1954, inclusive.

11. Specimen copies of *all* advertisements subscribed for by, or on behalf of Great Lakes and Currey.

12. All flight personnel assignment sheets, aircraft scheduling sheets, operations manuals, operations specification sheets for aircraft identification (Form ACA-518A), and pilot rosters.

13. *All* contracts, agreements and memoranda related to lease of office, ticket counter and maintenance space and facilities.

14. Specific flight, auditor and agent ticket coupons used in connection with various flights in 1953 and 1954.

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<sup>c</sup>Except as hereinafter noted in paragraphs 9, 10, 14, 15, 16 and 17.

15. *All* flight personnel assignment sheets or charts and minutes of *all* pilot meetings since May 1, 1952.

16. For the period May 7, 1952, through March 9, 1955, the following:

- a. *All* aircraft maintenance logs for aircraft owned or operated by Currey and Great Lakes;
- b. *All* aircraft identification sheets (Form ACA-518A) prepared by or for Currey and Great Lakes;
- c. *All* aircraft utilization sheets prepared by and/or for Currey and Great Lakes;
- d. All aircraft lease agreements and correspondence and memoranda relating thereto for aircraft operated by Currey and Great Lakes.

17. All aircraft routing sheets, aircraft assignment sheets and ship distribution charts prepared and/or used by Great Lakes and Currey since May 1, 1952.

18. Great Lakes is also directed to produce all Bills of Sale, Chattel Mortgages, Certificates of Registration, and Leases reflecting chain of title of aircraft owned and/or operated by Great Lakes and Nevada Aero Trades Company for the same 38-month period.

19. Appellant M. B. Scott is directed to produce *all* correspondence (letters, telegrams, notes and memoranda) between M. B. Scott, Inc. and eighteen (18) of the Respondents in Docket No. 6908, and *all* correspondence, invoices, statements and insertion orders in which the said eighteen (18) Respondents

are mentioned and *all* ledger sheets in the possession of M. B. Scott, which contain information regarding transactions with any of the said eighteen (18) Respondents; and copies of *all* insertion orders for radio or television advertising and orders for the printing of brochures and other advertising materials placed with M. B. Scott, Inc. by any of the said eighteen (18) Respondents. There is no time limitation or restriction whatsoever pertaining to the M. B. Scott subpoena. [R. 51-53.]

20. Appellant Orville Kelman is directed to produce *all* correspondence, contracts, agreements, memoranda, work papers and audit reports relating to the nineteen (19) Respondents in Docket No. 6908, since May 1, 1952. [R. 58-59.]

21. Appellant Harold Shein is directed to produce the following records and documents of Respondent Skycoach Agency of San Francisco, Inc., and any other entities using the style "Skycoach," for the period January 1, 1952, through February 21, 1955, inclusive: Copies of *all* quarterly recapitulations of payrolls and payroll tax sheets, together with any notes or memoranda indicating to whom such copies were provided and *all* copies of weekly recapitulations of receipts or disbursement sheets with notes or memoranda indicating to whom such copies were provided. [R. 53-54.]

22. Appellants Ida Mae Hermann, Irving E. Hermann and Robert M. Smith also are directed to produce their respective personal income tax returns for the calendar or fiscal years 1951 through 1954. [R. 40, 45, 48.]



No. 14,778  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

IDA MAE HERMANN, IRVING E. HERMANN, ROBERT M.  
SMITH, M. B. SCOTT, HAROLD SHEIN, H. C. RICH-  
ARDS, GEORGE PATTERSON, LEONARD ROSEN, ORVILLE  
KELMAN, and CAPTAIN G. D. THOMPSON,

*Appellants,*

*vs.*

CIVIL AERONAUTICS BOARD,

*Appellee.*

---

Appeal From the United States District Court for the  
Southern District of California.

---

**BRIEF FOR APPELLEE CIVIL AERONAUTICS  
BOARD.**

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**FILED**

**NOV - 9 1955**

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No. 14,778

IN THE

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FOR THE NINTH CIRCUIT

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IDA MAE HERMANN, IRVING E. HERMANN, ROBERT M.  
SMITH, M. B. SCOTT, HAROLD SHEIN, H. C. RICH-  
ARDS, GEORGE PATTERSON, LEONARD ROSEN, ORVILLE  
KELMAN, and CAPTAIN G. D. THOMPSON,  
*Appellants,*

*vs.*

CIVIL AERONAUTICS BOARD,

*Appellee.*

---

Appeal From the United States District Court for the  
Southern District of California.

---

## BRIEF FOR APPELLEE CIVIL AERONAUTICS BOARD.

---

### Jurisdictional Statement.

This is an appeal from an order of the United States District Court for the Southern District of California for the Southern Division, requiring compliance with certain administrative subpoenas issued by the Civil Aeronautics Administration Board. [R. 144.] Jurisdiction is conferred by Section 1291 of Title 28, United States Code.

### Statement of the Case.

This is an appeal from an order of the United States District Court for the Southern District of California, Central Division, requiring compliance with certain ad-

ministrative subpoenas issued by the Civil Aeronautics Board. [R. 144.]

The history of this litigation goes back to October 25, 1949, and the institution of an administrative proceeding, known as Docket No. 4161, in which Great Lakes Airlines, Inc., was charged, *inter alia*, with illegally holding out and operating regular air transportation services in combination with another air carrier through the use of a common agent.<sup>1</sup> Great Lakes was at that time, and is now, owned and controlled by Ida Mae Hermann and Irving E. Hermann, two of the respondents in the current Board proceeding (Docket No. 6908) and appellants herein. [R. 22-23.] The proceeding in Docket No. 4161 terminated in a consent cease-and-desist order, issued on August 28, 1952 (Board Order No. E-6748), which enjoined Great Lakes from combining with any other carrier or ticket agent to hold out or engage in regular air transportation services in contravention of

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<sup>1</sup>Great Lakes Airlines, Inc., is a so-called "large irregular carrier." It does not possess a certificate of public convenience and necessity pursuant to Section 401(a) of the Act (49 U. S. C. 481(a)), but is authorized to engage in irregular and infrequent air transportation only, under an exemption from the certificate requirement of such Section 401(a). This exemption was issued in accordance with Section 416 of the Act (49 U. S. C. 496) and is embodied in Part 291 of the Board's Economic Regulations (14 CFR 291.1, *et seq.*). Section 291.26(b) of the Economic Regulations (14 CFR 291.26(b)) provides "that no large irregular carrier shall make or maintain any agreement, or participate in any arrangement, with or involving any ticket agent or air carrier with respect to the conduct or holding out of air transportation services by such carrier individually or by such carrier in combination, conjunction or collaboration with another air carrier or carriers, where the collective air transportation service so agreed upon or arranged would, if conducted by a single carrier, take it out of the classification of an irregular air carrier as set forth" in said Part 291.



the Civil Aeronautics Act and the Board's Regulations. [R. 20.]

Subsequent informal investigation by members of the Board's staff disclosed that, prior to the issuance of such consent cease-and-desist order, the Hermanns had organized a new and more elaborate combine of irregular air carriers, ticket agency corporations, and other business entities in order to continue, on a larger scale, their illegal air transportation operations. [R. 15-35.]

Under these circumstances, the Board's Office of Compliance instituted the current administrative proceeding, termed Docket No. 6908, against the group of 19 persons and entities who collectively constitute, and operate as, the "Skycoach" air travel system. [R. 14-38.] The issues in the proceeding are summarized in the argument, *infra*, pages 10-11. Reduced to its simplest terms, however, the primary purpose of, and the principal issue in the proceeding, is to determine whether or not two individuals, Ida Mae Hermann and Irving E. Hermann, have unlawfully acquired and maintained control of a number of business entities and have conspired with such business entities to operate a scheduled airline without authority and otherwise to circumvent the provisions of the Civil Aeronautics Act and the Board's regulations.

In the course of this proceeding, the Hearing Examiner issued a number of *subpoena duces tecum*, returnable at the hearing in Los Angeles, and directed to several of the respondents, certain officers or employees of the respondents, and independent auditors and advertising agencies under contract with the respondents. Respondents moved to quash the subpoenas, including those directed to the independent auditors and advertising agencies, on the

grounds that they are burdensome and constitute a general fishing expedition into the affairs of the respondents. After argument, the Hearing Examiner denied the motion. The motion was then referred to the Board and additional argument was presented. Upon full consideration of the objections and argument presented by counsel, the Board issued an order affirming the ruling of the Hearing Examiner (Order No. E-9044, March 25, 1955). [R. 61-67.]

In its order, the Board stated:

“The subpoenas are not vague and indefinite, or incapable of understanding. Each one specifies the period concerning which documents and records are to be produced where appropriate, and describes the desired materials with particularity. In the light of the charges against the respondents, and particularly those relating to common control and activities constituting air transportation on the part of the non-carrier respondents, it does not appear to us that the subpoenas are excessively broad or unreasonable in scope. . . . They do not constitute fishing expeditions, but rather are requests for material relevant to previously defined charges and issues.” [R. 64-66.]<sup>2</sup>

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<sup>2</sup>The Board also stated:

“While certain of the subpoenas request numerous categories of documents and records of the respondents, there is no factual showing of the actual volume of materials involved, or that compliance will be unduly burdensome or oppressive. To the extent that compliance might require the yielding up of books and records necessary for the conduct of day-to-day business, or prove otherwise oppressive, the Examiner upon a proper showing to this effect has ample authority to permit an examination and copying of the materials at the places of business involved, and under conditions which will produce a minimum of interferences with business activities.” [R. 65.]

Notwithstanding the rulings by the Hearing Examiner and the Board, the respondents took the position that no subpoenas would be honored except pursuant to an order of the United States District Court for the Southern District of California. [R. 13.]<sup>3</sup> Consequently, on March 29, 1955, the Board filed a petition in the court below for an order requiring compliance with such subpoenas. [R. 4-13.] Respondents, appellants herein, filed an affidavit of Ida Mae Hermann in which it is averred that it would be necessary to search through "more than one million documents" in order to locate and produce the documents sought by the subpoenas [R. 109], and that the physical job of collecting these various documents is "staggering." [R. 115.]

On April 7, 1955, the District Court issued an order continuing the cause until April 18, 1955, on condition that the certain of the appellants, including Ida Mae Hermann and Irving E. Hermann, make the records called for by the subpoenas available to representatives of the Board at the places of business of such appellants. [R. 115-116.] At the hearing on April 18, 1955, the Board presented affidavits showing that the appellants had not complied with the court's order and, because of one excuse or another, had failed to make available a great many of the items required by the subpoenas. [R. 117-126.] The Board contended that the inspection of such

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<sup>3</sup>It may be noted, in this connection, that on March 16, 1955, the respondents in Docket No. 6908 filed an injunction action to prevent compliance by four Los Angeles banks with Board subpoenas calling for bank records concerning the respondents' financial affairs. (*Great Lakes Airlines, Inc., et al. v. Ruhlen, et al.*, Civil No. 17957-PH.) A motion for a preliminary injunction in that action was denied by Chief Judge Yankwich on March 17, 1955.

records as were made available did not satisfy its legitimate needs, and that it was entitled to an order enforcing the subpoenas as prayed for in the petition. Such an order was issued by the District Court on April 29, 1955. [R. 126.]

The appellants filed a motion for a rehearing or "new trial," which was argued on May 9, 1955. On May 12, 1955, the court issued a Memorandum for Order [R. 143] in which it denied the motion for rehearing and held:

"In laying the subpoenas alongside the charges in the Complaint, this Court cannot say that any of the documents or things called for in any of the subpoenas are immaterial or irrelevant to the proceedings before the Board, without an examination of all of the documents and things themselves, which this Court is not called upon to do at this stage of the proceedings."

The court further held that the Board is entitled to an order for the enforcement of the subpoenas as issued, "except that they should be modified to allow a sufficient length of time between dates for the production of the documents called for in subpoena so that the respondents will not be deprived of all their books and records at the same time." [R. 143.] Such an order, from which this appeal was taken, was docketed and entered on May 17, 1955. [R. 144.]

### **Statutes Involved.**

The provisions of the Civil Aeronautics Act principally involved are set forth in the Appendix hereto (pp. 1-3). Other pertinent provisions of the Civil Aeronautics Act and regulations thereunder are cited or quoted in the text of this brief.

### Summary of Argument.

Section 1004 of the Civil Aeronautics Act (App. pp. 2-3) specifically empowers the Board to issue subpoenas for the “production of *all* books, papers and documents relating to any matter under investigation.” (Emphasis supplied.) Administrative subpoenas are valid and enforceable if the documents demanded are “not plainly irrelevant” to any lawful investigation. If such documents meet this test, their volume and extent is immaterial, and it is no defense to the enforcement of the subpoenas that they may be burdensome or cause inconvenience.

It is clear from the record that the documents sought by the Board’s subpoenas are not “plainly irrelevant” but directly relate to the previously defined charges and issues in the administrative proceeding. It is also clear that, in view of the nature, purpose, and scope of the inquiry before the Board, the subpoenas are neither excessive nor unreasonable. The issues in the proceeding before the Board are unusually broad. The proceeding is, in essence, a conspiracy case, in that it is charged that two individuals have unlawfully acquired and maintained control of a number of business entities and have conspired with such entities to evade and circumvent the provisions of the Civil Aeronautics Act and to conceal from the Board the true nature of their operations. In order to establish this charge, it is, of course, essential to consider various records and numerous transactions between the respondents so that it may be shown that the respondents have entered into arrangements with each other, have channelled funds from one to another, and have otherwise transacted business with each other in a manner which is inconsistent with business practices of entities dealing at arm’s length. Under the circumstances, the subpoenas are proper in all respects and more than meet the requirements long established by many precedents.

## ARGUMENT.

The Board is charged by the Civil Aeronautics Act of 1938, as amended, with the broad responsibility of regulating the air transportation industry (49 U. S. C. 401, *et seq.*). Its investigative powers necessary to carry out such responsibility are correspondingly broad. Section 205(a) of the Act (49 U. S. C. 425 (a)) empowers the Board to conduct such investigations, pursuant to and consistent with the provisions of the Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under the Act. Section 415 (49 U. S. C. 495) authorizes the Board, for the purpose of exercising and performing its powers and duties under the Act, "to inquire into the management of the business of any air carrier, and, to the extent reasonably necessary for any such inquiry, to obtain from such carrier, and from any person controlling or controlled by, or under common control with, such air carrier, full and complete reports and other information." Section 1002 (49 U. S. C. 642) empowers the Board, upon complaint of any party or upon its own initiative, to institute investigations "with respect to anything done or omitted to be done by any person in contravention of any provision of this Act, or of any requirement established pursuant thereto."<sup>4</sup>

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<sup>4</sup>As shown hereafter, one of the matters being investigated by the Board in Docket No. 6908 is the alleged existence of control relationship between the various respondents, prohibited by 408(a) of the Act (49 U. S. C. 488 (a)). Section 408 (e) (49 U. S. C. 488(e)) expressly empowers the Board, upon complaint or upon its own initiative, to investigate the existence of such prohibited control relationships. Section 413 (49 U. S. C. 493) provides that "whenever reference is made to control, it is immaterial whether such control is direct or indirect."

To enable it effectively to carry out its investigations, Section 1004 of the Act (49 U. S. C. 644) specifically authorizes the Board to issue subpoenas for the "production of all books, papers, and documents relating to any matter under investigation."<sup>5</sup> The production of such books, papers, and documents may be required from any place in the United States at any designated place of hearing. In case of disobedience to a subpoena, the Board may invoke the aid of any court of the United States in requiring the production of such books, papers, and documents; and any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before the Board as a witness and produce the books, papers, or documents called for by such subpoena.<sup>6</sup>

It is pursuant to these provisions of the Civil Aeronautics Act that the administrative proceeding known as Docket No. 6908 was instituted and that the administrative subpoenas challenged here were issued.

The respondents in Docket No. 6908 are: two irregular air carriers, Great Lakes Airlines and Currey Air Transport; two individuals, Ida Mae Hermann and Irving E. Hermann; a partnership of such individuals engaged in the ownership and leasing of aircraft, Nevada

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<sup>5</sup>See also Section 407(e) (49 U. S. C. 487(c)) which gives the Board access to "all accounts, records, memoranda including all documents, papers, and correspondence" kept by air carriers and their affiliates.

<sup>6</sup>It may also be noted that the refusal to testify or produce books, papers, or documents in obedience to a subpoena of the Board constitutes a misdemeanor and is subject to a fine and imprisonment (Sec. 902(g), 49 U. S. C. 622(g)).

Aero Trades Company; a corporation organized for the purpose of providing gasoline products, Air International, Inc.; a holding company performing banking functions for the various respondents, Great Lakes Airlines Agency, Inc.; and 12 "Skycoach" ticket agency corporations. [R. 15, *et seq.*] The principal charges made by the Board's complaint in Docket No. 6908 [R. 15-35] may be summarized as follows:

1. Ida Mae Hermann and Irving E. Hermann have acquired and maintained control of the other respondents, in violation of Section 408(a) of the Act (49 U. S. C. 488(a)). This has been accomplished and is continuing through nominees or stock ownership, control of property, employees and equipment, leasing of aircraft, control of traffic solicitation and handling, financial management and control, and agreements, arrangements, and understandings of various types. [R. 24-25, 26-27, 32-33.]

2. The two air carriers respondents, Great Lakes Airlines and Currey Air Transport, have made and maintained agreements between themselves and the other respondents through which they have collectively held out and operated regular and frequent air transportation service between designated points, in violation of Section 401 of the Act (49 U. S. C. 481) and Part 291 of the Board's Economic Regulations (14 CFR 291.1, *et seq.*). [R. 19, *et seq.*] The carriers and ticket agents have, on numerous occasions, violated provisions of Parts 291 and 242 of the Economic Regulations of the Board (14



CFR 291.23, *et seq.*, 242.5(b)(4)) with regard to methods of ticketing passengers, the form of tickets used, and agreements between the carriers and the ticket agents. [R. 30-32.]

3. All the violations committed by the respondents were knowing and wilfull. The illegal acts and conduct were deliberately planned and executed for the purpose of evading and circumventing the Act and the regulations promulgated thereunder, and for the purpose of concealing from the Board the true nature of the operation. [R. 34.]

These charges largely determine the issues in Docket No. 6908.

The persons to whom the subpoenas under attack were directed are: Ida Mae Hermann, individually and as secretary-treasurer of Great Lakes Airlines, president of Air International, Inc., and co-partner in Nevada Aero Trades Company [R. 39]; Irving E. Hermann, individually and as president of Great Lakes Airlines Agency, Inc. [R. 43]; Robert M. Smith, individually and as executive vice-president of Currey Air Transport [R. 47]; H. C. Richards, maintenance co-ordinator for Great Lakes Airlines and Currey Air Transport [R. 9, 54]; George Patterson, vice-president of Great Lakes Airlines in charge of maintenance [R. 10, 55]; Captain G. D. Thompson, chief pilot for Great Lakes Airlines and Currey Air Transport [R. 11, 60]; M. B. Scott, president, M. B. Scott, Incorporated, an advertising agency under contract with the respondents [R. 8, 51]; Harold Shein and Orville Kelman, independent auditors

who have performed auditing services for the respondents. [R. 9, 11, 53, 58.]<sup>7</sup>

The materials called for by the subpoenas generally fall into the following categories: (1) financial and corporate records of certain of the respondents (including the personal income tax returns of the Hermanns and Robert Smith); (2) correspondence, memoranda, and agreements between the respondents; (3) personnel records of certain of the respondents; (4) data relating to ownership, identification, and utilization of aircraft and assignment of flight personnel; (5) advertising material disseminated to the public by radio, newspapers, display posters, and business cards; (6) airline tickets used by some of the respondents (flight coupons, auditor and agent coupons, and specimen of tickets and exchange orders).

It is clear from the statutory provisions involved that the only limitation on the Board's administrative subpoenas is that the material sought "relates to or touches the matter under investigation." *Cudahy Packing Co. v. N. L. R. B.*, 117 F. 2d 692, 694 (C. A. 10, 1941). And it is established under the cases that administrative subpoenas are valid if the documents demanded are "not plainly irrelevant to any lawful purpose of the agency"; *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 509 (1943); or if they appear to be "probably relevant" to a lawful investigation. *Smith v. Porter*, 158 F. 2d 372, 374 (C. A. 9, 1946), cert. den. 331 U. S. 816 (1947); *Hagen*

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<sup>7</sup>A subpoena *duces tecum* was also issued to Leonard Rosen, an employee of one or more of the Skycoach corporations [R. 10, 57.] The court's order, however, requires him to appear *ad testificandum* only. [R. 145.]

*v. Porter*, 156 F. 2d 362, 365 (C. A. 9, 1946), cert. den. 329 U. S. 729 (1946); *Provenzano v. Porter*, 159 F. 2d 47, 48 (C. A. 9, 1947), cert. den. 331 U. S. 816 (1947); *Jackson Packing Co. v. N. L. R. B.*, 204 F. 2d 842, 843 (C. A. 5, 1953). It is also established that if the books and records called for by administrative subpoenas are relevant, their volume and extent is immaterial, and it is no defense to the enforcement of such subpoenas that they may be burdensome or cause inconvenience. *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186 (1946); *Westside Ford, Inc. v. United States*, 206 F. 2d 627 (C. A. 9, 1953); *Fleming v. Montgomery Ward*, 114 F. 2d 384 (C. A. 7, 1940); cert. den. 311 U. S. 690 (1940); *McCarry v. S. E. C.*, 147 F. 2d 389, 392 (C. A. 10, 1945).<sup>8</sup>

A comparison of the Board's subpoenas with the administrative complaint demonstrates that the material sought by the Board's subpoenas is not "plainly irrelevant" but directly relates to the issues defined in the administrative proceeding. It is also clear that, in view of the nature, purpose and scope of the inquiry before the Board, the subpoenas are neither excessive nor unreasonable.<sup>9</sup>

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<sup>8</sup>"Petitioners stress that enforcement will subject them to inconvenience, expense and harassment. That argument is answered fully by what was said in *Myers v. Bethlehem Corp.* There is no harassment when the subpoena is issued and enforced according to law."

*Oklahoma Press Publishing Co. v. Walling*, *supra*, at p. 217.

<sup>9</sup>"Necessarily, as has been said, this cannot be reduced to a formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry."

*Oklahoma Press Publishing Co. v. Walling*, *supra*, at p. 209.

The issues in the proceeding before the Board are unusually broad. As already noted, the proceeding is, in essence, a conspiracy case, involving the charge that two individuals have unlawfully acquired and maintained control of a number of business entities and have conspired with such entities to evade and circumvent the provisions of the Civil Aeronautics Act and to conceal from the Board the true nature of their operations. The Board's Office of Compliance is attempting to prove, by competent evidence, that a number of seemingly independent corporate and non-corporate entities, while maintaining a semblance of independence on the surface, are actually operating as cogs in a controlled system, and that the system is being directed by two individuals. The only proof under such circumstances is to show the manner of operation of the entities, what their books and records contain and what their books and records do not contain, and gain a very clear picture of the business and financial inter-relationships between the entities. As found by Chief Judge Yankwich in the case of *Great Lakes Airlines, Inc., et al. v. Ruhlen, et al.* (*supra*, p. 5, note 3), which upheld the propriety of similar subpoenas arising out of the very same proceeding before the Board:

“One of the objects of the inquiry in the enforcement proceeding above-mentioned is to determine whether or not one or more of the respondents in that proceeding are controlled by certain of the other respondents. The issue is thus whether independent activities are not in truth and in fact a concert of action pursuant to control acquired and exercised in a manner prohibited by the provision of the Civil Aeronautics Act of 1938, as amended. The Court finds that latitude is necessary in the sub-

poenaing, presentation and reception of evidence in such proceedings to show the interrelations between the respondents in the enforcement proceeding with regard to the exercise of control.”

In light of the nature, purpose, and scope of the inquiry before the Board in Docket No. 6908, the subpoenas meet the requirements long established by many precedents. As has been stated, adequacy or excess in the breadth of a subpoena cannot be reduced to a formula. It may be pointed out, however, that subpoenas of similar, if not greater, breadth and scope have been repeatedly enforced by the courts. See, *e. g.*, *Brown v. United States*, 276 U. S. 134 (1927); *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541 (1908); *Oklahoma Press Publishing Co. v. Walling*, *supra*; *Hagen v. Porter*, *supra*; *Mines and Metals Corp. v. S. E. C.*, 200 F. 2d 317 (C. A. 9, 1952); *Provenzano v. Porter*, *supra*; *Westside Ford, Inc. v. United States*, *supra*.

Appellants contend that the Board, as the proponent of the subpoenas, has not sustained the burden of showing relevance and materiality, because it chose to rely on the specification of issues in the administrative complaint; and that the District Court acted as an “automaton” or “rubber stamp” because it did not require “a stronger and more precise” showing of materiality and relevancy (App. Br. pp. 17, 25, 26). What further proof the District Court should have required of the Board, the appellants do not say. There is certainly no better and, indeed, no other way of establishing that the categories of books and records sought in a subpoena relate to a matter under investigation than to consider them in light of the previously defined purpose, scope, and issues

of such investigation, unless the court should examine each and every one of the documents themselves. That, of course, is the function of the Hearing Examiner in ruling on the admissibility of documents into evidence after they are produced before him pursuant to the subpoena.

Moreover, in petitioning a court for an order to enforce administrative subpoenas, the Board does not occupy the usual position of a moving party to litigation insofar as the burden of proof is concerned. The Board's finding of relevance is entitled to the presumption of correctness; and the burden is on the person who challenges the Board's finding as unlawful to prove that the Board has erred, not on the Board to establish the correctness of its decision. *Kilgore Nat. Bank v. Federal Petroleum Board*, 209 F. 2d 557, 560 (C. A. 5, 1954); *Hagen v. Porter, supra*, at p. 365.<sup>10</sup> The appellants have denied the relevancy of the material sought by the subpoenas, but they have, in no way, rebutted the Board's showing of such relevancy.<sup>11</sup> Consequently, the Board properly relied on its petition, the administrative complaint, and other moving papers, as well as on its carefully considered finding [R. 61-67], *supra*, page 4;

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<sup>10</sup>"It therefore seems clear that the Board's stated finding of relevancy bears at least a *prima facie* stamp of correctness and is not required to be rejected by the court from which the Board must seek enforcement of its subpoena upon the opposition only of a plead denial."

*Kilgore Nat. Bank v. Federal Petroleum Board, supra*, at p. 560.

<sup>11</sup>The extent of the appellants' efforts in this direction are statements by Ida Mae Hermann that "it is difficult to imagine" the relevance of certain data contained in the aircraft maintenance logs, and that "most of the documents sought have no conceivable relation to the issues in the proceeding." [R. 114-155.]

and it was not required to introduce further evidence as to relevancy or make a “stronger and more precise showing”, whatever that might be. *Provenzano v. Porter*; *Smith v. Porter*; *Kilgore Nat. Bank v. Federal Petroleum Board*; *Hagen v. Porter*, all *supra*.

It is clear from the record that the books and records sought by the administrative subpoenas directly relate, and are essential, to develop the issues and establish the charges as defined in the administrative complaint. However, under the test established by the Supreme Court and repeatedly followed by this Court, it is sufficient if the books and records are “not plainly irrelevant” or appear to be “probably relevant” to the subject of the inquiry. (See, *supra*, pp. 12-13.) The language in the “Memorandum for Order” [R. 143] shows that the court below, far from acting as an “automaton” or “rubber stamp”, very carefully applied this test to the subpoenas involved in this case.<sup>12</sup>

As we have demonstrated, the material sought by the subpoenas is neither excessive nor unreasonable in relation to the issues in Docket No. 6908 as defined in the administrative complaint; and any resulting inconvenience to appellants therefore is no defense to the enforcement of such subpoenas. It should also be noted that the District Court expressly conditioned its enforcement order on the allowance of “a sufficient length of time between dates for the production of the documents called

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<sup>12</sup>It may be noted in passing that *National Labor Relations Board v. Pesante*, 119 Fed. Supp. 444 (S. D., Cal., 1954), which is relied on by appellants (App. Br. p. 27) and in which National Labor Relations Board subpoenas were denied enforcement because of oppressiveness, was decided by the very same judge who decided this case in the court below.

for in subpoena so that the respondents will not be deprived of all their books and records at the same time. [R. 143.] The history of this litigation, moreover, indicates that appellants' claim as to the difficulty of compliance may well be taken with a grain of salt. At the first hearing of this cause before the District Court, the appellants argued, as they argue here, that the physical task of complying with the subpoenas would be "staggering"; and they predicted that months and months would be required to search through "more than one million documents" in order to locate the various documents called for by such subpoenas [R. 107-115, App. Br. pp. 8-13.] However, at the hearing subsequent to the District Court's inspection order of April 7, 1955 [R. 115], they shifted their position. They then contended that many of the records, which would allegedly take months to assemble, were not available to them or did not exist.<sup>13</sup> It further appeared then that the alleged "compliance" by the appellants with the District Court's

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<sup>13</sup>The following are typical of the assertions then made by the appellants:

(a) There is no correspondence between the various respondents in Docket No. 6908 because, although allegedly independent of each other, they were "all out there together and transacted business verbally [R. 119]."

(b) Great Lakes Airlines and Currey Air Transport, the two air carriers involved, do not have "within their possession or control" any copies of carrier tickets or any coupons of such tickets. [R. 120, 132, 140.]

(c) Great Lakes Airlines and Currey Air Transport have no copies of advertising other than telephone directory advertising. [R. 120, 133-134.]

(d) Most of the records of Great Lakes Agency, Inc., allegedly the banking agency for all the respondents in Docket No. 6908 [R. 25], were "either lost or stolen." [R. 131, 119.]

(e) The stock certificates of Currey Air Transport are nowhere to be found. [R. 139.]



order [R. 130, 137] was accomplished with only the intermittent assistance of Robert M. Smith and Ida Mae Hermann, and that the only dire consequence was that Ida Mae Hermann was unable to complete her personal income tax return and had to request an extension of time to file her tax return on April 15, 1955. [R. 136, 141.]

Appellants remaining arguments are likewise without merit. For example, they contend that the Board is not entitled to the enforcement of its subpoenas for the reason that certain of the records were available to the Board pursuant to Section 407(e) of the Act (49 U. S. C. 487(e)), which permits the Board to have access to the properties of air carriers and their affiliates. But the right of the Board to inspect a carrier's records at the carrier's premises, and the right to subpoena the production of records to a designated place of hearing for evidentiary purposes, plainly serve different purposes and are independent of each other. In any event, the history of this litigation, especially the abortive results of the inspection under the district court's order, make it apparent that any attempt to obtain the required books and records on a voluntary basis would have been quite futile.

A similar argument made by the appellants is that the Board is already in possession of "many of the documents" sought by the subpoenas—*i. e.*, "most of the pertinent data contained in the aircraft maintenance logs" of aircraft owned and operated by Great Lakes; "all of the Great Lakes advertising materials called for in the subpoena addressed to Mrs. Hermann;" and the balance sheets and profit and loss statements of Great Lakes

and Currey (App. Br. pp. 15-16). It is true that, by Board regulation, irregular air carriers are required to file certain statistical summaries of data which may be contained in aircraft maintenance logs, copies of all publicity material relating to passenger operations, and balance sheets and profit and loss statements. However, in view of the background of this case and the nature of the charges against Great Lakes and Currey, the Board may well be skeptical of the validity of any documents filed by them voluntarily. Moreover, the subpoena directed to George Patterson calls for the production of the aircraft maintenance logs themselves, rather than any summaries of such logs. [R. 56.] And, according to Mrs. Hermann's affidavit, the only publicity material filed with the Board by Great Lakes consist of copies of telephone directory advertising. [R. 133.]<sup>14</sup> Thus, the only documents called for by the subpoenas which may already be in the Board's possession, are copies of telephone directory advertising and balance sheets and profit and loss statements. These documents constitute but a small fraction of the number sought by the subpoenas. Such duplication, if any, is surely no justification for appellants' flat refusal to comply. At most it is a defense to the production of the duplicates in question. This problem can of course be resolved by the Hearing Examiner, and this Court may so provide in its opinion if it feels such action to be appropriate.

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<sup>14</sup>The subpoena addressed to Mrs. Hermann calls for "specimens of all hand cards, brochures, schedules and other advertising material distributed to the public by Great Lakes Airlines, Inc. and/or its ticket agents," and "specimen copies of all newspapers, radio, telephone directory, and magazine advertisements subscribed for by or on behalf of Great Lakes Airlines, Inc." [R. 40-41.]

Finally, appellants object to the production of the personal income tax records of Ida Mae Hermann, Irving E. Hermann, and Robert M. Smith. According to her affidavit, Mrs. Hermann

“does not wish to have her personal financial affairs revealed in a public hearing and she will be greatly damaged and injured in her personal financial affairs and will be caused extreme embarrassment if these documents are produced. The production of these documents relating to the personal financial affairs of affiant will expose these private financial transactions to the public and will cause affiant extensive financial loss and damage [R. 114].”

Appellants contend that the courts have generally refused to require the production of copies of personal income tax returns under Rule 34 of the Rules of Civil Procedure. Those cases in which the courts have so ruled related only to litigation between private parties and have no application to proceedings before federal regulatory agencies.<sup>15</sup> In such proceedings, the production of copies of personal income tax returns are commonly required. See, *e. g.*, *Smith v. Porter*, *supra* at p. 373.

The Civil Aeronautics Act, moreover, provides certain safeguards for any person reluctant to produce documents on the ground that they might adversely affect his interests or tend to incriminate him. Section 1104, 49 U. S. C. 674, provides that the Board shall, on the filing of a written objection, order any information contained in the documents withheld from public disclosure when in

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<sup>15</sup>It may be noted that, contrary to counsel's assertion, the weight of authority is that income tax records are available under Rule 34 even as between private parties. See *Mullen v. Mullen*, 14 F. R. D. 142, 143 (D. Alaska, 1953).

its judgment disclosure would adversely affect the interests of such person and is not required in the interest of the public. Section 1005(i), 49 U. S. C. 644(1), provides full immunity from prosecution as to any matter concerning which any such person is compelled to produce evidence despite a plea of self-incrimination.

Appellants also argue, in this connection, that the Board has had ample opportunity to obtain the information contained in such income tax returns pursuant to the district court's inspection order; and that the Board has failed to show that such information cannot be obtained "direct from the witnesses for the asking" (App. Br. pp. 23-24). This argument requires no answer except to point out that the personal income tax records of these individuals were excluded from the District Court's inspection order, and that any attempt to obtain the information "direct from the witnesses for the asking" would have been a useless gesture.

One further point must be noted. The results of the inspection order issued by the Court below make it clear that many of the documents called for in the subpoenas are not available. As an experienced trial Judge, the Court below could not have been unaware of the evidentiary value of a lack, rather than the presence, of documents and memoranda concerning day-to-day business between entities which hold themselves out to be unrelated. In short, there is substantial evidentiary value, under the issues made by the pleadings in the administrative proceedings, in showing exactly what records the various respondents in that proceeding have and do not have. This evidence, particularly in conjunction with the other evidence, might well support a finding of control.

### Conclusion.

For all of the foregoing reasons, it is respectfully submitted that the order of the District Court is in all respects proper and should be affirmed.

Respectfully submitted,

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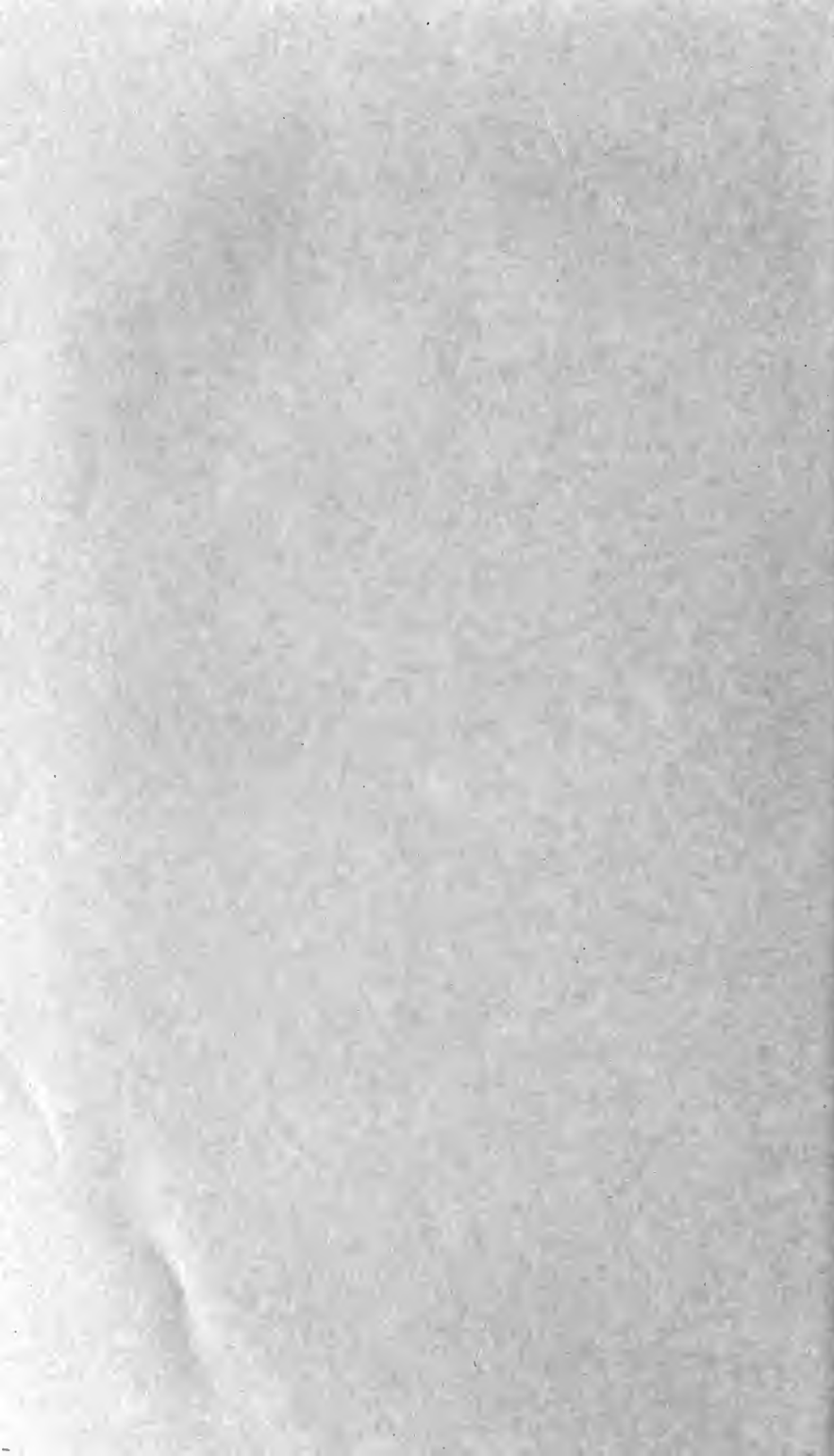
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## APPENDIX.

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended are as follows:

### General Powers.

Sec. 205. [52 Stat. 984, 49 U. S. C. 425.] (a) The Authority is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act.

### Complaints to and Investigations by the Authority.

Sec. 1002. [2 Stat. 1018, 49 U. S. C. 642.] (a) Any person may file with the Authority (Board) a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Authority (Board) to investigate the matters complained of. Whenever the Authority (Board) is of the opinion that any complaint does not state facts which warrant an investigation or action on its part, it may dismiss such complaint without hearing.

### Investigations on Initiative of Authority.

(b) The Authority (Board) is empowered at any time to institute an investigation, on its own initiative, in any case and as to any matter or thing concerning which com-

plaint is authorized to be made to or before the Authority (Board) by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Authority (Board) shall have the same power to proceed with any investigation instituted on its own motion as though it had been appealed to by complaint.

#### Entry of Orders for Compliance With Act.

(c) If the Authority (Board) finds, after notice and hearing, in any investigation instituted upon complaint or upon its own initiative, that any person has failed to comply with any provision of this Act or any requirement established pursuant thereto, the Authority (Board) shall issue an appropriate order to compel such person to comply therewith.

#### EVIDENCE.

Sec. 1004. [52 Stat. 1021, 49 U. S. C. 644.] (a) Any member or examiner of the Authority (Board), when duly designated by the Authority (Board) for such purpose, may hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, and receive evidence at any place in the United States designated by the Authority (Board). In all cases heard by an examiner or a single member the Authority (Board) shall hear or receive argument on request of either party.

#### Power to Issue Subpena.

(b) For the purposes of this Act the Authority (Board) shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, and documents relating to any matter

under investigation. Witnesses summoned before the Authority (Board) shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

### Enforcement of Subpena.

(c) The attendance of witnesses, and the production of books, papers, and documents, may be required from any place in the United States, at any designated place of hearing. In case of disobedience to a subpoena, the Authority (Board), or any party to a proceeding before the Authority (Board), may invoke the aid of any court of the United States in requiring attendance and testimony of witnesses and the production of such books, papers, and documents under the provisions of this section.

### CONTEMPT.

(d) Any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before the Authority (Board) (and produce books, papers, or documents if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.



No. 14778

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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IDA MAE HERMANN, IRVING E. HERMANN, ROBERT M.  
SMITH, M. B. SCOTT, HAROLD SHEIN, H. C. RICH-  
ARDS, GEORGE PATTERSON, LEONARD ROSEN, ORVILLE  
KELMAN, and CAPTAIN G. D. THOMPSON,

*Appellants,*

*vs.*

CIVIL AERONAUTICS BOARD,

*Appellee.*

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Appeal From the United States District Court for the  
Southern District of California.

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## REPLY BRIEF FOR APPELLANTS.

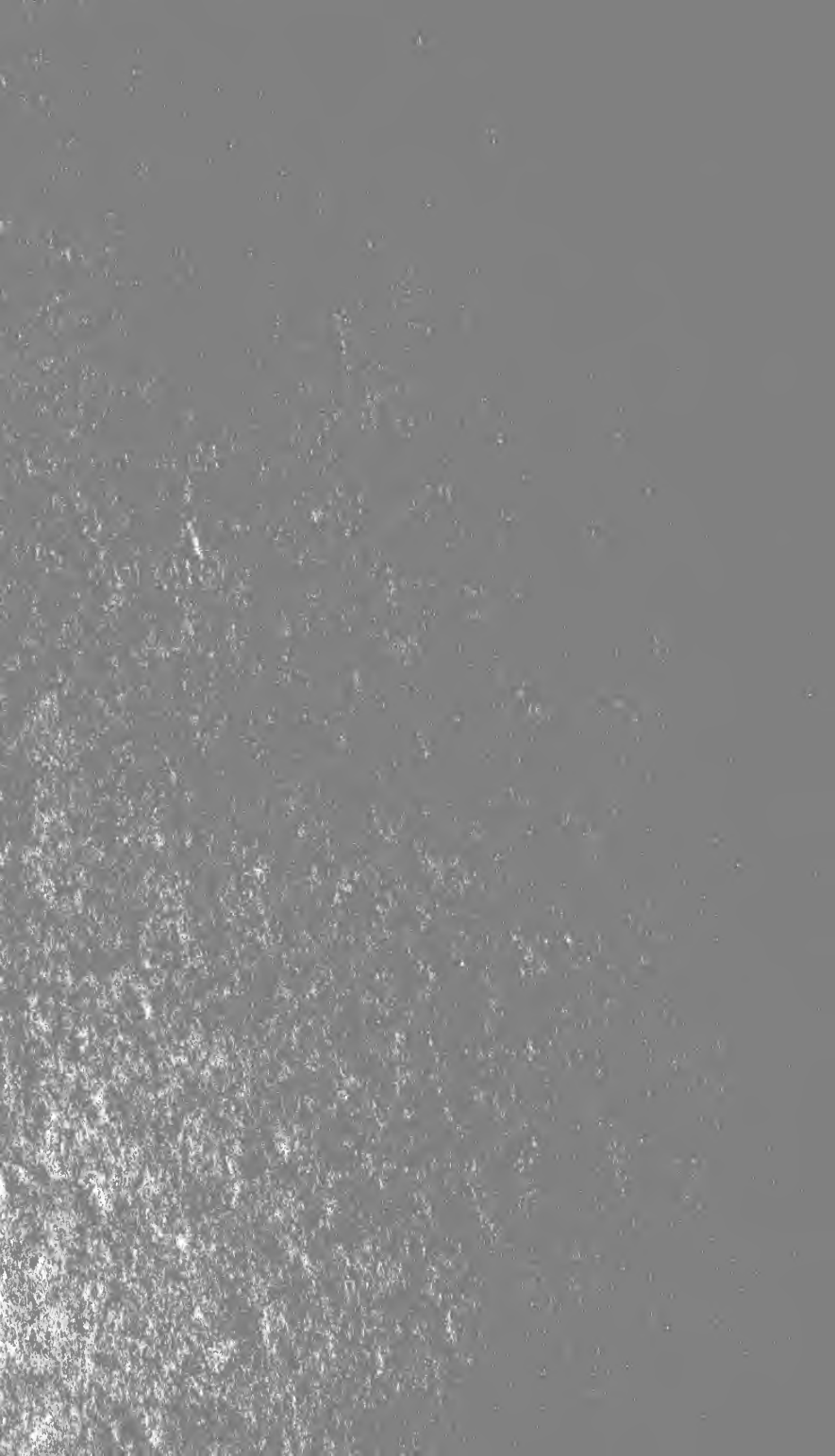
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FILED

NOV 28 1955

PAUL P. O'BRIEN, CLERK



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The appellee, the Civil Aeronautics Board, hereinafter called the "Board," has cited various cases to this Court in its brief which purport to show that so long as the documents sought in the Board's subpoenas at issue on this appeal "relates to or touches the matter under investigation"<sup>1</sup> or, conversely, are "not plainly irrelevant to any

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<sup>1</sup>"relates to or touches the matter under investigation"; *Cudahy Packing Co. v. National Labor Relations Board*, 117 F. 2d 692, 694 (C. A. 10, 1941), cited by the Board in support of the quoted language, concerns a subpoena issued by the National Labor Relations Board to obtain information pertinent to an election to select the bargaining representative of respondent's employees and was not a "trial or adversary proceeding." Respondent's principal objection to the subpoena was that the National Labor Relations Board's order directing the election was void because of arbitrary

lawful purpose of the Agency,"<sup>2</sup> this Court must order the subpoenas enforced. The Board says this Court has no authority to decline to enforce these subpoenas if the documents demanded "appear to be probably relevant to a lawful investigation."<sup>3</sup> The Board then urges that once these minimal and wholly mechanical tests are met, the volume and extent of the documents sought in the

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and capricious acts committed and delays caused by the Board. The quoted language is dictum and merely paraphrases the statute giving the District Court jurisdiction to enforce the administrative subpoena. The court stated, at 117 F. 2d 693, that the respondent "does not . . . contend that the evidence sought by the Board does not relate to the subject under investigation."

<sup>2</sup>"not plainly irrelevant to any lawful purpose of the agency"; *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 509 (1943). The principal question in this case is whether the Secretary of Labor, in administering the Walsh-Healy Public Contracts Act, could issue and enforce an administrative subpoena without first determining that respondents were within the coverage of the statute. Respondents argued that the documents demanded were not material or relevant only because respondents' claimed that its activities were not covered by the statute. They raised no defense respecting the validity of the subpoenas themselves. The Supreme Court decided that coverage could be determined in the same proceeding with issues relating to violations.

<sup>3</sup>"appear to be probably relevant to a lawful investigation"; *Smith v. Porter*, 158 F. 2d 372, 374 (C. A. 9, 1946), cert. den., 331 U. S. 816 (1947). The quoted language is clearly dictum because respondent had argued that the subpoena and court order enforcing subpoenas were void and unlawful for reasons totally unrelated to relevance and materiality of the documents demanded. "No point is made [by the respondent] as to the materiality of any particular document called for in the subpoena." (158 F. 2d 374.) In the absence of objection by the respondent, the court said that the documents were probably relevant to the inquiry, which was an investigation by the Office of Price Administration and not a "trial or adversary proceeding."

*Hagen v. Porter*, 156 F. 2d 362, 365 (C. A. 9, 1946), cert. den., 329 U. S. 729 (1946). This case concerned an investigation by the Office of Price Administration to determine whether respondent was complying with the Administrator's regulations. It was not a "trial or adversary proceeding." In discussing respondents' defense that the documents were neither relevant nor material, the court stated, at 156 F. 2d 364-365: "Appellants' principal complaint under these assignments seems to be that the Administrator failed to

subpoenas is immaterial and cannot be considered by this Court.<sup>4</sup>

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allege the existence of probable cause for believing that appellants have violated the Act."

*Provenzano v. Porter*, 159 F. 2d 47, 48 (C. A. 9, 1947), cert. den., 331 U. S. 816 (1947). The principal issues present here were probable cause and coverage of the statute. The Office of Price Administration was merely conducting an investigation and this was not a "trial or adversary proceeding." The respondents had failed to produce the documents sought in the subpoena, for inspection.

*Jackson Packing Co. v. N. L. R. B.*, 204 F. 2d 842, 843 (C. A. 5, 1953). The "prime ground" urged for reversal here was that the subpoenas were not properly issued and the authority to issue subpoenas could not be delegated by the Administrator. (204 F. 2d 843.) The court permitted inspection of records subject, however, to control of the inspection by the District Court should the Board use the subpoenas in an unreasonable or oppressive manner.

<sup>4</sup>*Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186 (1946), is discussed in the text, *infra*.

*Westside Ford, Inc. v. United States*, 206 F. 2d 627 (C. A. 9, 1953). This case does not support the proposition it is cited for by the Board. The proceeding was an administrative investigation, not a "trial or adversary proceeding," and the court ordered an inspection of documents on the premises of the respondent. While it is stated at 206 F. 2d 635, that "enforcement of a lawful subpoena, will not be denied because it causes inconvenience or harassment," the court had reference to alleged administrative improprieties and harassing actions which had no relation whatsoever to burdensomeness of the demand or materiality or relevance of the documents sought in the subpoena.

*Fleming v. Montgomery Ward*, 114 F. 2d 384 (C. A. 7, 1940); cert. den., 311 U. S. 690 (1940). This proceeding was an administrative investigation and was not a "trial or adversary proceeding." The principal issue was whether or not the Administrator had shown "reasonable cause" to believe that the respondent was violating the Act. The case lends no support to the stated proposition.

*McCarry v. S. E. C.*, 147 F. 2d 389, 392 (C. A. 10, 1945). This proceeding concerned an investigation and was not a "trial or adversary proceeding." The court stated that the test of the validity of the subpoena is whether the documents called for are pertinent and relevant to the inquiry and added the important qualification that "The process is lawful if it confines its requirements within the limits which reason imposes in the circumstances of the particular case." (147 F. 2d 392.)

A swift appraisal of the foregoing assertions of the Board gives rise to the immediate impression that the Board cannot be correct in each of its arguments. A critical analysis of these propositions reveals that each and every one of them is invalid and find no support in the cases cited by the Board.<sup>5</sup>

The Board's analysis is defective primarily for two reasons:

1. The administrative subpoenas at issue in each of the cases cited by the Board in support of the foregoing propositions were issued in exploratory administrative investigations which were not "trial or adversary proceedings."

2. These propositions of the Board are taken out of context in actions to enforce administrative subpoenas where the principal issue was coverage of the administrative statute, the existence of probable cause, the validity of issuance of the subpoena or prior arbitrary, capricious or delaying actions on the part of the administrative agency.

Appellants have shown in their main brief that there is a real distinction between the allowable breadth of *subpoenas duces tecum* issued in an exploratory administrative investigation, on the one hand, and administrative subpoenas issued in the course of a "trial or adversary proceeding" on the other hand. This Court stated in *Hagen v. Porter, supra*, at 156 F. 2d 365, that:

" . . . the standards of materiality or relevancy are far less rigid in an *ex parte* inquiry to determine the existence of violations of a statute, than those applied in a trial or adversary proceeding."

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<sup>5</sup>See Footnotes 1-4, *supra*.

This quotation was later cited with approval by this Court in *Westside Ford v. United States, supra*, footnote 4, a case relied upon by the Board. The Office of Price Stabilization was conducting an investigation of respondent's business records in the *Westside Ford* case. There were no charges pending nor was any punitive relief sought by the administrative agency. The Board also relies upon *Oklahoma Press Publishing Co. v. Walling, supra*, footnote 4, which is readily distinguishable upon the same ground. There the Court stated, at 327 U. S. 201:

“The very purpose of the subpoena and of the order, as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the administrative judgment, the fact thus discovered should justify doing so.”

In Docket 6908, the Board seeks an order (1) revoking the licenses to engage in air transportation held by Great Lakes Airlines, Inc. and Currey Air Transport, Limited; (2) requiring each of the respondents in Docket 6908 to cease and desist from violating Section 408 of the Civil Aeronautics Act; and (3) requiring each of the respondents in Docket 6908 to cease and desist, jointly or severally, from engaging in air transportation directly or indirectly [R. 35]. In short the Board seeks to put each of the respondents out of business in this proceeding. This administrative proceeding, as distinguished from the administrative proceedings in the cases cited by the Board, is truly a “trial or adversary proceeding.”

The subpoenas in the *Oklahoma Press* case sought the production of specified records to determine whether the

respondents were violating the Fair Labor Standards Act, "including records relating to coverage." (327 U. S. 189.) The court stated, at 327 U. S. 217, in footnote 57:

"The issues of . . . relevancy of the materials sought, and breadth of the demand are neither minor nor ministerial matters. Nor would there be any failure to satisfy fully the discretionary power implied in the statute's use of the word 'may,' rather than 'shall,' . . . in authorizing the court to enforce the subpoenas."

Section 1004(d) of the Act (49 U. S. C. 644(d)) similarly provides that the court "may" issue an order requiring the production of documentary evidence.

The principal argument of the respondents in the *Oklahoma Press* case was coverage. The case stands primarily for the proposition that coverage should, in the first instance, be determined by the administrative agency, which may proceed to require the production of evidence upon its own determination that the respondent is within the purview of the administrative statute. All of the other cases relied upon by the Board are concerned primarily with the questions of coverage, probable cause, validity of the issuance of the subpoenas and/or arbitrary, capricious or delaying actions by the administrative agency. In each of these cases the principal contention of the respondent related to one or more of these issues and the discussions by the court from which most of the citations relied upon by the Board are taken, are merely dictum or relate to makeweight arguments raised in these cases. This appeal, on the other hand, is not concerned with the questions of coverage or probable cause but instead is limited to the validity of the administrative subpoenas themselves.

Appellee makes many factual statements in its brief which are not of record on this appeal. While appellants do not propose to discuss each of these factual allegations in this reply brief, they cannot leave unchallenged the statement contained on page 18 of appellee's brief that appellants "shifted their position" at the hearing subsequent to the District Court's inspection order of April 7, 1955 by contending that many of the records and documents sought in the subpoenas were not available to appellants or did not exist.

The District Court's inspection order of April 7, 1955 provided that the Board's representatives could inspect the facilities of the respondents in Docket 6908 and make copies and photographs of the documents located thereat and further provided that the hearing before the District Court would resume on April 18, 1955 [R. 115-116]. At this latter hearing, the Board's representatives presented affidavits to the Court, without notice to appellants, which purported to show that appellants had not complied with the inspection order of April 7, 1955 [R. 117-125]. The District Court, relying upon the accuracy and veracity of these affidavits, ordered each of the subpoenas enforced as written [R. 126].<sup>6</sup> Appellants, in seeking a rehearing or new trial, filed counteraffidavits which demonstrated that appellants had complied with the inspection order of the District Court [R. 129-142]. This was not a shift of position by the appellants, as alleged by the Board. It was necessary for appellants to file affidavits answering the Board's charge that they had failed to permit inspection in order to obtain a rehear-

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<sup>6</sup>Except the subpoena issued to Appellant Leonard Rosen who was ordered to appear *ad testificandum* only [R. 145].

ing in the District Court. Appellants were successful in obtaining a rehearing, which was had on May 9, 1955.

The Board, in Footnote 13 appearing on page 18 of its brief, makes certain assertions which also must be answered. The Board says the appellants claimed there was no correspondence between the various respondents in Docket No. 6908 because they were "all out there together and transacted business verbally." The quotation consists of a double hearsay statement contained in an affidavit filed by one Joseph W. Stout, an air transport examiner employed by the Board. Mr. Stout is quoting a statement purportedly made by Mr. Richard H. Keatinge, one of the attorneys for the appellants and the respondents in Docket 6908. The Board has apparently overlooked the fact that Mr. Keatinge, in an affidavit filed in support of appellants' petition for rehearing on April 29, 1955 sets forth his statements to Stout which differ materially from Stout's hearsay statement. While Mr. Keatinge's affidavit was not included in appellants' designation of record on appeal, it is available in the records of the District Court and can be produced at the argument, if this Court should so desire.

The Board's next allegation is that Great Lakes Airlines, Inc. and Currey Air Transport Limited do not have "within their possession or control" any copies of carrier tickets or any coupons of such tickets. While the Board's statement is literally true, the Board has apparently overlooked the fact that it also sought enforcement of another subpoena issued in Docket No. 6908 in Civil Action No. 18122-PH in the United States District Court for the Southern District of California entitled "In the Matter of the Petition of the Civil Aeronautics Board for an



Order, etc.” This subpoena is directed to eight of the Skycoach Ticket Agents respondents in Docket No. 6908.<sup>7</sup> For convenience this subpoena is summarized in the appendix to this brief.

The Skycoach subpoena is of importance on this appeal because a stipulation was filed in that cause dated July 19, 1955 and so ordered by Pierson M. Hall, United States District Judge on July 27, 1955, providing that the decision in that cause “shall be governed as to legal principles by the final decision” in this appeal and the District Court is authorized to enter judgment in the Skycoach proceeding in accordance with the legal principles pronounced in this proceeding. This stipulation is set forth in the appendix to this brief. The Skycoach subpoena requires each of the Skycoach respondents to produce all agent and auditor coupons taken from tickets sold to the public during the first three months of 1953 and the last three months of 1954, as well as each of the individual ticket coupons contained in the subpoenas at issue on this appeal [R. 42-43, 50].

The Board states that Great Lakes Airlines, Inc. and Currey Transport Limited have no copies of advertising other than telephone directory advertising. Mrs. Hermann stated in her affidavit that to the best of her knowledge all of the advertising of Great Lakes Airlines, Inc., consisted of telephone directory advertising, other than lists of parts and equipment distributed by the mainte-

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<sup>7</sup>Skycoach Agency of Nevada, Inc.; Skycoach Airlines Agency of Chicago, Inc.; Skycoach Agency of Los Angeles, Inc.; Skycoach Airlines Agency of Milwaukee, Inc., Skycoach Airlines Agency of Detroit, Inc.; Skycoach Agency of San Francisco, Inc.; Skycoach Airlines Agency of New York, Inc., and Super Skycoach Airlines Agency, Inc.

nance division of Great Lakes Airlines, Inc., which the Board representatives stated the Board had no interest in inspecting [R. 133-134].

It is literally true that most of the records of Great Lakes Agency, Inc. were either lost or stolen, as alleged by the Board. However, Mrs. Hermann testified to the disappearance of these records in a previous proceeding before the Civil Aeronautics Board known as Docket No. 5132, the so-called "Non-Scheduled Investigation Case," commencing November 11, 1953 [R. 131-132]. The Board was fully familiar with the fact that these records were either lost or stolen sometime in 1953, and Mrs. Hermann's sworn testimony rendered it unnecessary to include these documents in a subpoena in order to establish this fact on the record in Docket No. 6908.

The Board alleges that the stock certificates of Currey Air Transport Limited are nowhere to be found. While Appellant Robert M. Smith was unable to locate his stock certificate [R. 139], just how this justifies the Board's conclusion that all of the stock certificates of Currey are nowhere to be found, is entirely unexplained. Stock certificates are normally in the possession of the owner of the said certificates, not in the possession of the corporation. The Board does not state, nor could it, that all of the stockholders of Currey Air Transport Limited were called upon to exhibit their stock certificates or were required to do so. In fact, the only stockholder of Currey Air Transport Limited required to produce a stock certificate was Appellant Smith.

There is no basis whatsoever in the record that compliance by the appellants with the District Court's inspection order was accomplished with only the intermittent

assistance of Appellants Robert M. Smith and Ida Mae Hermann. In fact, the record shows that a full and complete inspection was permitted and that Appellants Robert M. Smith and Ida Mae Hermann cooperated fully with the Board's staff [R. 129-142]. The Board stated to the District Court on April 7, 1955 that a period of eleven days would be sufficient time to conduct its inspection. The Board then came forward with affidavits on April 18, 1955 purporting to show that all of the documents included in the subpoenas were not available for inspection, while the Board should have requested additional time to complete the inspection, if, in truth and in fact, it desired a thorough inspection.

### Conclusion.

Upon the basis of the foregoing reasons and authorities and the reasons and authorities set forth in appellants' main brief, the order of the District Court should be reversed.

Respectfully submitted,

KEATINGE, ARNOLD & OLDER,

By ROLAND E. GINSBURG,

*Attorneys for Appellants.*

November, 1955.







## APPENDIX.

Title 49, U. S. C. A., Section 644. Evidence. . . .

(d) Any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before the Board (and produce books, papers, or documents if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

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### SUMMARY OF SUBPOENA AT ISSUE IN CIVIL ACTION 18122-PH.

The Respondents Skycoach Agency of Nevada, Inc.; Skycoach Airlines Agency of Chicago, Inc.; Skycoach Agency of Los Angeles, Inc.; Skycoach Airlines Agency of Milwaukee, Inc.; Skycoach Airlines Agency of Detroit, Inc.; Skycoach Agency of San Francisco, Inc.; Skycoach Airlines Agency of New York, Inc., and Super Skycoach Airlines Agency, Inc., are required to produce the following records and documents for the years 1952 through January 17, 1955, inclusive:

1. All general ledgers and all subsidiary books and ledgers, and all vouchers, invoices, journals and other supporting documents to the entries in said books and ledgers.
2. All audit reports, financial statements (balance sheet, schedules of cash receipts and disbursements and profit and loss statements).
3. All minutes and notes of directors' meetings and stockholders' meetings, stock record books and all stock certificates.

4. All bank statements and cancelled checks.
5. Specimens of all hand cards, brochures, schedules and other advertising material distributed to the public by the said corporations.
6. All contracts and agreements between any of the foregoing Skycoach ticket agencies and between any of them and the following:
  - Great Lakes Airlines, Inc.
  - Currey Air Transport, Limited
  - Irving E. Hermann and Ida Mae Hermann individually and as co-partners d/b/a Nevada Aero Trades Company,
  - Air International, Inc.
  - Great Lakes Airlines Agency, Inc.
7. All individual personnel and payroll records.
8. All correspondence between any of the corporations, partnerships and persons listed below and between any of them and persons or entities acting for or on the behalf of any of them:
  - Great Lakes Airlines, Inc.
  - Currey Air Transport, Limited
  - Irving E. Hermann and Ida Mae Hermann individually and as co-partners d/b/a Nevada Aero Trades Company
  - Air International, Inc.
  - Great Lakes Airlines Agency, Inc.
  - Skycoach Agency of Nevada, Inc.
  - Skycoach Airlines Agency of New York, Inc.
  - Skycoach Airlines Agency of Chicago, Inc.
  - Skycoach Agency of Los Angeles, Inc.



Skycoach Airlines Agency of Newark, Inc.

Super Skycoach Airlines Agency, Inc.

Skycoach Airlines Agency of Boston, Inc.

Skycoach Airlines Agency of Virginia, Inc.

Skycoach Airlines Agency of Milwaukee, Inc.

Skycoach Airlines Agency of Detroit, Inc.

Skycoach Airlines Agency of Washington, Inc.

Skycoach Agency of San Francisco, Inc.

Copies of all income tax returns filed for the calendar or fiscal years 1951 through 1954, inclusive, for the eighth respondent Skycoach ticket agencies and for Gladys M. Sheppard individually.

For the first three months of 1953 and the last three months of 1954, specimens of all tickets and exchange orders sold to the public by the eighth respondent Skycoach ticket agencies, or any of its subagents, and all agent and auditor coupons taken from documents (tickets) actually sold to the public by the said ticket agency corporations during the said first three months of 1953 and the last three months of 1954.

All of the specific flight, auditor and agent ticket coupons required to be produced in the Ida Mae Hermann and Robert H. Smith subpoenas [R. 42-43, 50]

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United States District Court, Southern District of California, Central Division.

In the Matter of the Petition of the Civil Aeronautics Board for an Order requiring Gladys M. Sheppard and Skycoach Agency of Nevada, Inc.; Skycoach Airlines Agency of Chicago, Inc.; Skycoach Agency of Los Angeles, Inc.; Skycoach Airlines Agency of Milwaukee, Inc.; Skycoach Airlines Agency of Detroit, Inc.; Skycoach Agency of San Francisco, Inc.; Skycoach Airlines Agency of New York, Inc., and Super Skycoach Airlines Agency, Inc., to comply with subpoenas issued by a Hearing Examiner of the Civil Aeronautics Board. Civil No. 18122-PH.

STIPULATION PLACING CAUSE OFF CALENDAR AWAITING  
THE TERMINATION OF APPEAL.

Whereas, the legal issues presented in this proceeding are essentially the same as, and are related to, those presented in a previous proceeding before this Court entitled In the Matter of the Petition of the Civil Aeronautics Board for an Order Requiring Ida Mae Hermann, etc., No. 18031-PH, the subpoenas in each case being essentially similar and all the said subpoenas having been issued in connection with the same administrative proceeding, and;

Whereas, this Court has heretofore issued an Order Enforcing Subpoenas in No. 18031-PH, and an appeal has been taken therefrom, which is pending before the United States Court of Appeals for the Ninth Circuit, and a Stay of Proceedings to Enforce the said Order Pending Appeal having been granted;

It Is Stipulated by and between the parties hereto, through their respective counsel, that this cause may be placed off calendar to be reset at the instance of either

party or by the Court at such time as the appeal in No. 18031-PH has been decided, and;

It Is Further Stipulated that the decision in this case shall be governed as to legal principles by the final decision on appeal in No. 18031-PH; that this Court may enter judgment in this proceeding in accordance with the said legal principles, except that the Court may make such other and further Orders governing the course of this proceeding as it may deem proper in the premises.

Dated this 19th day of July, 1955.

KEATINGE, ARNOLD & OLDER,  
By /s/ ROLAND E. GINSBURG,  
*Attorneys for Respondents.*

LAUGHLIN E. WATERS,  
*United States Attorney,*

MAX F. DEUTZ,  
*Assistant U. S. Attorney,*  
*Chief of Civil Division,*

ANDREW J. WEISZ,  
*Assistant U. S. Attorney,*

ROBERT BURSTEIN,  
*Compliance Attorney,*  
*Civil Aeronautics Board,*  
/s/ ANDREW J. WEISZ,  
Andrew J. Weisz,  
*Assistant U. S. Attorney,*  
*Attorneys for Petitioner.*

It Is So Ordered This 27th day of July, 1955.

/s/ PEIRSON M. HALL,  
*United States District Judge.*















